IN THE SUPREME COURT OF PENNSYLVANIA,
IN EQUITY.
No. 73.

THE ERIE AND NORTH-EAST RAILROAD CO., Pl'ff in Error,

vs.

JOSEPH CASEY.

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Pleas enrolled before the Honorable Supreme Court of the State of Pennsylvania, at their July term, in the year of our Lord one thousand eight hundred and fifty-six, begun and held on the sixteenth day of July, in the year aforesaid, at the City of Philadelphia, being in the Eastern District of said State.

Present, the Hon. Ellis Lewis, Chief Judge, Walter H. Lowry, George W. Woodward, John C. Knox, and Jeremiah S. Black, Esquires, Associate Judges of said Court.

In the record of the proceedings of said Court, amongst other things, is the following:—

(*Wm. L. Hirst, W. M. Meredith, St. Go. T. Campbell, Thompson.*)

THE ERIE AND NORTHEAST RAILROAD COMPANY

vs.

JOSEPH CASEY.

Docket Entries, No. 2.

December Term, 1855.

Bill in *in* equity filed November 19th, 1855, and subpœna *exit* the first Monday in January, 1855. "Service accepted."

And now, November 19th, 1855, on motion of Messrs. Campbell, Hirst and Meredith, of counsel of complainants, the defendant present on notice, it is ordered (per Woodward, J.) that a rule be entered to show cause why a special injunction should not issue in this case, according to the prayer of the bill, ret'ble before the Court at Philadelphia on the first Monday of January next, and that admonitory order issue to the def't, directed, commanding him to suspend all action under the act of Oct. 6, 1855, mentioned in the bill of complaint, until the hearing and decision of said rule.

Dec. 19th, 1855. Exhibits referred to in bill filed.

Jan'y 8th, 1856. Argued.

Jan'y 28th, 1856. Opinion by Black, J. Injunction refused. Opinion filed.

Jan'y 28th, 1856. Opinion of Lowrie, J., filed, concurring.

" " Opinion of Knox, J., filed, concurring.

" " Opinion by Lewis, C. J., filed, dissenting.

" " Opinion by Woodward, J., filed, dissenting.

" " On motion of St. Geo. T. Campbell, Esq're, bill allowed to be amended. Rule granted by the Court on defendant, to demur, plead or answer in fifteen days from this date.

Jan'y 28th, 1856. Amendments to bill filed by leave of Court.

" " Rule on def'ts to demur, plead or answer in fifteen days.

Feb'y 11th, 1856. On motion of George Griscom, Esq., and affidavit of Joseph Casey, and James Thompson, Esq., filed, it is ordered that the time for the filing of the answer of the defendant be extended for the period of ten days from the time fixed by the order of the Court of the 28th ultimo.

Feb'y 22d, 1856. Defendant's answer filed.

March 10th, " Copy of commission of Joseph Casey filed.

" 17th, " On motion of St. Geo. T. Campbell, Esq., the Court appoint James Sill and George Cutler, jointly to be examiners to take depositions and other evidence in the City of Erie and Erie County, to be read on the hearing of the above cause.

And it is further ordered that at least eight days' previous notice be given to the parties at Erie before commencing to take testimony; and that the testimony on both sides be closed and filed by the examiners in the office of the clerk for the Middle District at least two weeks before the day appointed for the hearing of the cause.

"*Eodie.*" And now, on motion of St. Geo. T. Campbell, it is ordered that the record in this cause be certified to the Middle District, and that the first Monday of May, 1856, be appointed for the final hearing thereof.

May 31st, 1856. Plea in bar filed, subject to complainant's counsel, and order granted to Prothonotary of the Eastern and Western Districts.

June 7th, 1856. Cause set down for hearing by complainants. Argued by Hirst, Stanton and Meredith for complainants; Thompson and Franklin pro def'ts.

July 16th, 1856. It is ordered, adjudged and decreed that the plaintiffs' bill of complaint in this cause be dismissed, and that the defendant do recover from the plaintiffs the costs by him in this behalf expended.

July 28th, 1856. Certificate of Prothonotary of the Middle District, filed in words following, to wit:—

"Bill in equity, filed 5th May, 1856. Argued by Meredith and Hirst pro plff.; Casey for def't. Amendments to def't's answer admitted and filed, wherein the Court make the following order:—

6 May, 1856. The Court being satisfied that the amendment to the answer moved for by Mr. Casey is necessary to reach the merits of the case, do allow the said amendment to be filed upon terms.

That the testimony on both sides be taken before examiners, and closed on the 4th Monday of May, instant.

That the final hearing of the cause upon bill, answering and proof be heard upon Saturday, June 7th, prox.

On motion of Mr. Casey, the Court appoint the same examiners who took proof before, 6 May, 1856.

Ordered that the Cleveland, Painesville, and Ashtabula Railroad Co'y's *vs.* City of Erie, be heard at the same time.

Exit. copy of order of Court to Wm. L. Hirst, Pl'ff.

Exit copy of order of Joseph Casey, and two copies of amended answer pro Def't.

And now, to wit, 19th May, 1856, on motion of def't, the Court order 1st, that the testimony taken by both parties in the case of the Commonwealth *ex rel. vs.* F. W. Hughes, the Erie and Northeast Railroad Co'y, No. 7, Dec. Term, 1853, with the Exhibits, Maps and Diagrams, &c., attached to the record or given in evidence in said cause, be read as testimony in this case on the hearing of the same, as though it had been taken in this cause.

That the Clerk of the Eastern District be directed to certify the proceedings in the said case, No. 7, Dec'r, 1853, to this district before the 7th June proximo.

Motion refused.

November 29th, 1856. Writ of error from Supreme Court of the United States brought into office.

November 29th, 1856. Bond filed.

I certify the above and foregoing to be a true and accurate copy of the docket entries in the above case.

In witness whereof I have hereunto set my hand and affixed the seal of the Supreme Court of Pennsylvania for the Eastern District, at Philadelphia, this fifth day of December, A. D. 1856.

[SEAL.] J. F. BELSTERLING,
Pro Proth'y.

Be it remembered that heretofore, to wit, on the nineteenth day of November, in the year of our Lord one thousand eight hundred and fifty-five, the complainants by their solicitors, Messrs. Campbell, Hirst, and Meredith, filed in the office of the Clerk of the Court aforesaid, in the District aforesaid, their bill of complaint, and on the day and year aforesaid, sued out of the office of the Clerk aforesaid their writ of subpœna, in the words and figures following, to wit:

EASTERN DISTRICT OF PENNSYLVANIA,

[SEAL.] *City and County of Philadelphia,*
The Commonwealth of Pennsylvania.

To Joseph Casey:

We command you that you personally be and appear before the Justices of the Supreme Court of Pennsylvania, at a Court to be holden at Philadelphia, in and for the Eastern District, on the first Monday of January (1856) next, to answer to a bill of complaint exhibited against you in our said Court by The Erie and Northeast Railroad Company, and to do further, and to receive what our said Court shall have considered in this behalf.

And this you are not to omit under the penalty of four hundred dollars.

Witness the Honorable Ellis Lewis, Chief Justice of our said Court at Philadelphia, the nineteenth day of November, in the year of our Lord one thousand eight hundred and fifty-five.

J. F. BELSTERLING,
Pro Prothonotary.

☞ *Memorandum:* The defendant has to enter his appearance in *the* suit in the Prothonotary's Office on or before the day at which the writ is returnable, otherwise the bill will be taken *pro confesso.*

J. F. BELSTERLING,
Pro Prothonotary.

Which said writ of subpœna was returned into the office of the Clerk of the Court aforesaid, on the day and year aforesaid, endorsed as follows, to wit:

"I accept service of this subpœna.

JOS. CASEY."

"November 19th, 1855."

Which said bill is in the words and figures following, to wit:

THE ERIE AND NORTHEAST RAILROAD CO.
vs.
JOSEPH CASEY.

SUPREME COURT OF PENNSYLVANIA.

In Equity.

Dec. Term, 1855. No. 2.

The Erie and Northeast Railroad Company bring this, their bill of complaint, against Joseph Casey, and thereupon your orators complain and say, that in and by Act of Assembly of the Commonwealth of Pennsylvania, approved the 12th day of April, A. D. 1842 (to which reference is craved, as though here set forth at large), and by the due performance of all things therein required, there was created and established by the authority of this commonwealth, the corporation, complainants, with all the powers and privileges thereby, and by all supplements thereto, granted and conferred. That on the 9th of August, A. D. 1849, under and in pursuance of said act the said complainants commenced the construction of the road therein referred to. That at the time of the commencement thereof, the limits of the Borough of Erie extended only to that part of the now City of Erie, as is comprised between the streets now known as Parade, Chestnut, and Twelfth Streets, and the harbor thereof—and that under and by virtue of an Act of Assembly, approved the fifteenth day of April, A. D. 1851, the said City of Erie was incorporated, comprising the said borough with extended limits. That upon the first day of January, 1852, the railroad of the complainants was

completed, from Sassafras Street in the said City of Erie, to the east boundary line of the Township of Northeast, in the County of Erie, and that the location of the said road within the City of Erie, and the use of the streets thereof, were approved by the corporate authorities of the said borough, and such use was authorized and licensed by resolutions duly passed by the Select and Common Councils of the said City of Erie, on the 10th day of November, 1851, to which reference is craved, as though here set forth at large. That the same were so occupied, and no contest whatever existed as to the rights of complainants, or the manner of their exercise, until after the passage of an Act of Assembly, approved the 11th day of April, A. D. 1853, which authorized a change in the gauge of railroads in this commonwealth, and by which the complainants were lawfully enabled to, and did change the gauge of their road. That upon the passage of said last mentioned act, the corporate authorities of the said City of Erie, upon the 19th day of July, A. D. 1853, passed an ordinance, to which reference is craved, as though here set forth. That the said railroad, so completed, has, from the 8th day of January, A. D. 1852, to the present time, except while undergoing repairs and reconstruction after damage from mobs and riot, been in continued public use for the transportation of passengers and freight, and has afforded to all persons and the commonwealth the facilities and benefits intended by its incorporation.

That after the said railroad was so completed and had been brought into use between the points aforesaid, an Act of Assembly of the said commonwealth was passed and approved the 14th day of April, A. D. 1852, to which reference is craved, as though here set forth at large, by which the continued corporate existence of the complainants was recognized.

That the complainants have expended in the construction of the said road and in the maintenance thereof, the sum of about $750,000, which expenditure was made in good faith, and with full reliance upon the charter thereof, and that they have received heretofore, and are entitled to receive the revenues and profits lawfully derivable therefrom.

That notwithstanding the premises, the said Commonwealth of Pennsylvania, ex-relatione Francis W. Hughes, Esq., her Attorney-General, did, to the December Term, 1853 (No. 7), of this Honorable Court, institute certain proceedings in equity against the complainants, as in and by the record thereof, to which reference is craved, will fully and at large appear.

That under and in pursuance of the decree of this Honorable Court in that cause, and before the passage by the legislature of the said commonwealth of the act hereinafter mentioned, the complainants extended their said road, at a cost of about $50,000, to the said borough of Erie, as it existed at the time of their incorporation, and have in all things complied with and submitted to the decrees of this Court in said cause.

That by the said proceeding in the manner and form aforesaid, the said commonwealth waived any forfeiture which had heretofore occurred, if any had occurred, and was and is equitably estopped from alleging as a ground of forfeiture against the complainants, any matter or thing mentioned in the bill filed in said proceedings. And the complainants aver, that under the decree and subsequent orders of the said Court in the cause aforesaid, the railroad of said complainants was, at the time of the passage of the said Act of Assembly, approved Oct. 6th, 1855, and still is under the immediate, special, and actual care and protection of this Court, and is now being used by virtue of, and under the said decree and orders.

That notwithstanding the promises and the obedience of the complainants to the decrees of this Honorable Court, the said legislature passed an Act, approved the 6th day of October, A. D. 1855, to which reference is craved as though here set forth at large.

That under and in pursuance of the said last mentioned act, the governor of the said commonwealth has appointed the defendant, Joseph Casey, with all the power and authority thereby conferred, and that he, the said defendant, in pursuance of said last-mentioned act, and without claim of any other authority whatsoever, is about to enter upon and take possession of the said railroad of the complainants, and to execute and fulfil the provisions of the said last-mentioned act, and threatens and intends to take possession of the said railroad, and to keep the same; and that he, the said defendant will so do, to the great and irreparable damage of the complainants, unless restrained by this Honorable Court.

That the complainants have not accepted the provisions of the said last-mentioned act, and are advised that they are in nowise bound by the provisions thereof, and that the said Act, approved the said 6th day of October, A. D. 1855, entitled "An Act to repeal the charter of the Erie and Northeast Railroad Company, and to provide for disposing of the same," and all and every of the provisions thereof so far as they are intended to or do effect the vested rights of the complainants under the charter aforesaid, and take their property, is and are repugnant to the provisions of the 10th section of the first article of the Constitution of the United States, and to the provisions of the 10th section of the 9th article of the Constitution of Pennsylvania, and therefore wholly and utterly void and cannot confer any authority upon the defendant to enter upon and take possession of the property of the complainants, or to take the income and revenues thereof, or to collect the special taxes by said last-mentioned act attempted to be imposed on the complainants.

To the end therefore that the defendant may, if he can, show why your orators should not have the relief prayed for, and may upon his corporate oath or affirmation, full, true, direct, and perfect answer make to the premises, and especially

First. Whether he has been appointed by the Governor of Penn-

sylvania, under the authority of the said last mentioned Act of Assembly, or by any other and what authority, to enter upon and take possession of the railroad of the complainants; and if such authority be in writing, that he annex to his answer hereto a true copy thereof.

Second. Whether he intends, in pursuance of such authority or otherwise, to enter upon and take possession of said railroad, and to take and receive the income and revenues thereof.

And that the said defendant may be restrained by a writ of special injunction to him directed, commanding and strictly enjoining him not to enter upon or take possession of the said railroad of complainants with its appurtenances, or in anywise interfere or intermeddle therewith, or take or attempt to take the revenues and income thereof, or collect the special tax aforesaid, and that your honors will adjudge, order, decree, and declare that the said Act of Assembly, approved the said 6th day of October, A. D. 1855, is, so far as the same affects the complainants, repugnant to the Constitution of the United States and the Constitution of the State of Pennsylvania, and further that the said commonwealth is estopped from setting up as a ground of forfeiture against the complainants, any matter or thing mentioned in the bill filed in said proceedings, and particularly the matters recited in the said Act of Assembly as the ground of forfeiture therein, and thereby attempted to be declared and enforced, and further that the defendant may be perpetually enjoined and commanded not to enter upon or take possession of the aforesaid railroad of the complainants or its appurtenances, or in anywise interfere or intermeddle therewith, or take or attempt to take the revenues and income thereof, or collect the special tax aforesaid.

And that your honors will grant unto your orators such other and further relief in the premises as may be consistent with justice and equity, and will grant unto your orators the commonwealth's writ of subpœna to the said defendant directed, commanding him to be and appear before this Honorable Court on a day certain, and answer the several matters and things herein objected against him, and abide the order and decree of your honors in the premises.

ST. GEO. T. CAMPBELL,
For Complainants.

Defendant is required to answer interrogatories numbered first and second.

ST. GEO. T. CAMPBELL.

Nov. 19*th*, 1855.

THE ERIE AND NORTHEAST RAILROAD CO.
vs.
JOSEPH CASEY.

John H. Walker being duly sworn, says: That he has read the foregoing bill of complaint—that so far as the statements therein

contained are within his own knowledge, they are true, and so far as the same are derived from the information of others, he verily believes the same to be true. That he verily believes the said defendant, in pursuance of the authority of the Governor, and by virtue of the said Act of Assembly, approved the 6th day of October, A. D. 1855, in said bill mentioned, is about to enter upon and take possession of the railroad and property of the complainants. That the complainants did expend the sum of about fifty thousand dollars in extending or bringing their road to the borough of Erie, as it was at the time of their incorporation and in obedience to the direction and decree of the Supreme Court, in altering its location at Harbor Creek.

JNO. H. WALKER.

Sworn to and subscribed before me, Nov. 19th, 1855,

JNO. B. KENNEY,
Alderman.

And now, to wit, on the said nineteenth day of November, in the year aforesaid, the complainants appeared, by their solicitors, and the defendant, in his own person, *on notice*, before the Honorable George W. Woodward, one of the associate justices of said Court (at his chamber), in the City of Philadelphia. On motion of the solicitors for complainant, it was ordered and adjudged that a rule be entered against the defendant, to show cause why a special injunction should not issue in this case according to the prayer of the bill, returnable before the Supreme Court at Philadelphia, on the first Monday of January next, and that an admonitory order, issue to the defendant, directed, commanding him to suspend all action under the Act of Oct. 6, 1855, mentioned in said bill of complaint, until the final hearing and decision of said rule.

And afterwards, to wit, on the 19th day of December, in the year last aforesaid, the complainants, by their solicitors, filed in the office of the clerk aforesaid, the exhibits, referred to in their bill of complaint, in the words and figures following, to wit:—

Exhibit A.

An act to incorporate the Erie and Northeast Railroad Company, and for other purposes.

Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same, That Thomas H. Sill, Rufus S. Reed, Samuel Hays, George Kellogg, Samuel Brown, George A. Elliott, John H. Walker, Elijah Babbitt, William Kelley, John A. Tracy, John Galbraith, P. S. V. Hamot, Giles Sandford, Andrew Scott, Joseph H. Williams, William Fleming, Joseph M. Sterret, Smith Jackson, James Williams, William H.

Wallace, Abijah Beebee, Alexander W. Brewster, Wilson King, J. W. Hunter, Alexander McClelland, Asa F. Shadduck, J. C. Vanauken, Samuel Low, John Dodge, Andrew Couse, Bester Town, Mark Baldwin, Philetus Glass, Robert McNeil, and William W. Loomis, or any three of them, be and they are hereby appointed commissioners, to do and perform the following duties, that is to say: they shall, on or before the first day of December, Anno Domini one thousand eight hundred and forty-three, open a book or books, at such place or places as they or a majority of the said three shall agree upon, appointing one or more of their number to attend thereat, and receive the subscriptions so made to the stock of the said company, and in the said book or books shall be written as follows: "We whose names are hereto subscribed do severally promise to pay the treasurer of the Erie and Northeast Railroad Company the sum of fifty dollars for each share of stock which we subscribe for, in such proportion, time, and place, as the President and Directors of said company shall direct, and witness our hands and seals this day of one thousand eight hundred and ." Of the opening of which book or books four weeks' notice shall be given, by advertisement in two newspapers in Erie, and in any other papers which the said commissioners may direct. The said books shall be kept open for two weeks at least in each place, for the space of six hours in each juridical day, unless the capital stock of said company shall be subscribed for before the expiration of that time, when the said books shall be closed. The capital stock of said company shall consist of one hundred thousand shares, and all persons shall be permitted to subscribe in said books who are of lawful age, either by themselves or by legally authorized attorneys, in fact, and any incorporated company or body politic may be authorized to subscribe as aforesaid: Provided, That no subscription shall be received unless the person so subscribing shall pay at the time of subscribing five dollars on each share so taken.

Section 2. When one thousand or more shares of said stock shall be subscribed, the said commissioners, or any five of them, shall certify to the governor, by oath or affirmation, the names of the subscribers, and the number of shares taken by each, whereupon the governor shall, by letters patent, under his hand and the seal of the commonwealth, create and erect the subscribers, together with those who may afterwards subscribe, into a body politic, and corporate, in deed and in law, by the name, style, and title of the Erie and Northeast Railroad Company, and by that name to have perpetual succession, with all the privileges, franchises, and immunities, incident to a corporation, and be able by said name to sue, and be sued, plead, and be impleaded, in all courts of record, and elsewhere; and to purchase, receive, have, hold, and enjoy, to them and to their successors, lands, tenements, and hereditaments, goods and chattels, with estates, real, personal, and mixed, of what kind or quality the same may be, which may be necessary for the construction of said

railroad, and for no other purpose; and make such dividends of the profits of the road, from time to time, as the President and Directors, or a majority thereof, may determine; and also to make and have, keep and use, a common seal, and the same at any time to alter or renew, and also to make and ordain such by-laws and regulations for the government of said corporation as are necessary and useful, and not contrary to the laws of the commonwealth, or of the United States; Provided, That the said company shall not be allowed to exercise any banking privileges, or any other liberties and privileges than such as are necessary to the making and maintaining of said road: and Provided also, That the said road be made of the T or H rail, or such other iron rails as may be approved by the President of the Board of Canal Commissioners, for the time being, and duly certified to the governor.

Section 3. The commissioners before named, or a majority of them, as soon after the letters patent are obtained as convenient, shall give notice by advertisement for three weeks in the papers before named, of the time and place appointed for organizing said company; at the time and place appointed as aforesaid tellers shall be elected by those present, when a president and six directors shall be ballotted for, together with a treasurer, and a majority of the stockholders present, shall elect a president, treasurer, and directors; that said president and directors, or a majority of the same, shall appoint such other officers and agents as shall be needed in conducting the business of said company, and shall fix the compensation of the same; the said president, treasurer, and directors, shall hold their offices for one year from the said day of election when a new election shall be held: Provided also, that if any such election shall fail to take place, that the said company shall not thereby be dissolved, and in case any vacancy shall occur in the board from death, resignation, or refusal to serve, the said vacancy shall, or may be supplied by the directors, or a majority thereof, until the next annual election.

Section 4. The said president and directors shall meet at such time and place as may by them be agreed upon, and five thereof shall constitute a quorum, of whom in the absence of the president they shall pro tempore elect a chairman; they shall keep minutes of all their transactions, fairly entered in a book to be kept for that purpose, and all orders drawn upon the treasurer shall be signed by the president after a resolve to that effect has passed the board.

Section 5. Certificates of stock in this company shall be assignable, and if any stockholder neglect after thirty days' notice to pay up the instalments of his stock, he shall be liable to pay in addition to the said instalment, at the rate of twelve per cent. for one year, on all sums which may remain due for such length of time, and a neglect or a refusal to pay during any greater length of time may be considered as a forfeiture of such stock to the company.

Section 6. The president and managers of said company, by them-

selves or their agents, shall have power to construct a railroad from the borough of Erie to some point on the east boundary line of the township of North-East, in the county of Erie, and for this purpose the said company shall have power by themselves, or their agents, to enter in and upon, and to occupy, any land on which the said road may be located, or which may be necessary for the use of said company, and thereon to construct said road with its necessary buildings and fixtures, and likewise to construct any bridge, or bridges, across any navigable stream, not obstructing the same, and the said company shall pay, or satisfy the owner of such land, so taken; and if the parties cannot agree upon the compensation for the damages so done, or the land thus required, it shall be lawful for the said parties to choose five men out of any county adjoining that in which the land so required is situated, to assess the damages sustained, or value the lands taken or required by said company; and if they cannot agree upon five persons, as aforesaid, then it shall be lawful for either party to apply to the Court of Common Pleas of the county in which the land so required is situated, or in which damages have been done, who shall award a venire to the sheriff to summon a jury of seven disinterested men from any adjoining county, to come together on a given day, of which both parties shall have notice, in order to ascertain and report to the said Court the damages (if any) have accrued to the owners of any lands, houses, or other buildings, injured by said company, or the value of the lands taken up by, or required for the construction of said railroad, as the case may be; which said jury being first sworn or affirmed, justly and equitably to assess the damages (if any) which may have been sustained or the value of the land so required, shall proceed to estimate such damages, or the quantity or quality of the land to be occupied by the said road, taking into consideration the advantages as well as the disadvantages of the same; and shall report the amount of damages, or value of the land, as the case may be, to the Court, which report shall be confirmed in twenty days after the filing of the same, unless exceptions be entered by either, in which case, if exceptions be filed by the person claiming damages, the said company may be permitted upon giving such security as the Court of Common Pleas aforesaid may require, for the payment of the damages that may be finally assessed, and tendering to the claimant or paying into the Court the amount of damages so assessed, or the value of the lands required, to enter upon said land, and proceed with their work, subject however to the amount which the claimant may be enabled to establish on final judgment against them: Provided always, That in case the owner, or owners, of any of the lands through which the said road shall pass, be feme covert, minors, *non compos mentis*, or living out of the State, without trustees, guardians, committees, or accredited agents, residing in the county in which their lands are situated, then it shall be the duty of the said company to make known the fact to

the said Court, who shall appoint some suitable person, or persons, to act in their behalf, under the control of said Court; the said company shall also have power to enter upon any lands under the same regulations, to dig, take, and carry away, any earth or stone, which may be necessary for the construction or repairing the said road: Provided, That neither the said company, its officers, or agents, or workmen, shall enter on lands for such purpose without the consent of the owner, until the company shall pay to such owner the amount of damages he may sustain by entering on his lands, and the value of the earth or stone which may be required for said company, or give security for the payment of the same within six months from doing the damage, or taking such earth or stone; and in case the parties cannot agree on the amount the same shall be fixed by three disinterested freeholders, to be appointed by one of the nearest justices of the peace, on the application of either party, with notice to the other party.

Section 7. The said railroad shall be so constructed as not to impede or obstruct the free use of any public road, street, lane, or bridge, now laid out, opened or built, nor to interfere with any burial ground, dwelling-house, or building, without the consent of the owner, and where the said road severs the lands of any person, or persons, the company shall be required to erect and maintain good and convenient crossings, either by bridges or otherwise, where the same may be necessary.

Section 8. The said company shall have the power to keep and maintain such motive powers as they may deem necessary for the said road, and to regulate the time and manner of travelling, the kind and description of cars to be used for the transportation of passengers, or freight, and the compensation to be received by the said company for the same: Provided, That the toll on any species of property shall not exceed eight cents per ton per mile, nor upon each passenger five cents per mile.

Section 9. At each annual meeting of the stockholders the president and directors of the preceding year shall make a statement of the condition of the company: Provided, also, That whenever the president and a majority of the directors may see proper, a general meeting of the stockholders may be called, or when those representing one-third part of the capital stock shall request it.

Section 10. If the company aforesaid do not complete the said work so as to bring it into use within ten years after the passage of this act, or after completion shall suffer the road to go to decay and become impassable for the space of two years, then this charter shall become null and void.

Section 11. At the end of three years from the granting of this charter, the said company shall furnish annually thereafter an abstract of their financial condition to the auditor-general, and if the said company misuse, or abuse any of the privileges hereby granted,

the legislature may resume the rights and privileges hereby granted to the said company.

JAMES ROSS SNOWDEN,
Speaker of the House of Representatives.

JOHN STROHM,
Speaker of the Senate.

Approved the twelfth day of April, eighteen hundred and forty-two.

DAVID R. PORTER.

An act to reduce the capital stock of the Erie and Northeast Railroad Co.

Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, that the capital stock of the Erie and Northeast Railroad Company, be, and the same is hereby reduced to six hundred thousand dollars, or twelve thousand shares; and the commissioners or so many of them, as by the first section of the act incorporating said company are authorized to open books and receive subscriptions to the stock thereof, be and they are hereby authorized and required after four weeks' notice in at least two newspapers published in the borough of Erie, to reopen the books and receive subscriptions to the stock of said company at the Reed House, in said borough, or such other place in the same borough as they shall deem most expedient; and the said books shall remain open for at least two weeks, and until at least fifty thousand dollars, or one thousand shares shall be subscribed therein, including what is already subscribed, and the proceedings thereupon shall be as provided in the act incorporating said company.

FINDLEY PATTERSON,
Speaker of the House of Representatives.

DANIEL L. SHERWOOD,
Speaker of the Senate.

Approved the eleventh day of March, one thousand eight hundred and forty-six.

FRS. R. SHUNK.

Exhibit B.

The following preamble and resolutions passed the Select and Common Councils of the City of Erie, the 10th day of November, A. D. 1851, viz:—

Whereas, the President and Directors of the Erie and Northeast Railroad Company have applied for leave to lay down a track of said road on the north side of Penn Street, and two or three tracks

on Ritner Street, for the purpose of giving them access to their wood-house on Penn Street by trains, and for the purpose of enabling them to break up long trains coming into the city, and back their cars on to the north part of their depot lot; therefore,

Resolved, by the Select and Common Council of the City of Erie, That as far as the Mayor, Select and Common Councils have legal power and authority in the premises, the privilege asked for as aforesaid be, and the same is hereby granted upon condition, however, that the said track be so laid and used as to prevent the least possible obstruction to the ordinary travel and business of said streets, and placed as directed by the council, and good planking to be substantially built and kept in repair, both inside and outside the said tracks by the said Railroad Company.

Resolved further, That the said privilege is granted upon the express condition that said city shall not be liable in any form or manner for the damage which any individual may in any way sustain by reason of the laying down or use of said railroad track, but all such damage (if any) shall be paid by the company.

Resolved further, That the Select and Common Councils reserve the right to withdraw the privilege hereby granted, provided the use and occupancy thereof shall appear to them to be injurious to the interests and welfare of said city.

Exhibit C.

Act 14th April, 1852.

Section 14. That the election of president, directors, and treasurer, provided for in the act incorporating the Erie and Northeast Railroad Company, shall hereafter be conducted in the following manner, that is to say: The directors, for the time being, shall appoint two of the stockholders, not being directors or candidates, to be judges of the said election, and to conduct the same, who shall severally take and subscribe an oath or affirmation before an alderman or justice of the peace, well and truly, and according to law, to conduct such election to the best of their knowledge and abilities; and the said judges shall decide upon the qualifications of voters, and when the election is closed, shall count the votes, and declare who has been elected, and make out and deliver a written certificate of the same at all such elections, or other general or special meetings; the stockholders shall be allowed to vote in person or by proxy; and the number of votes to which each stockholder shall be entitled shall be according to the number of shares he or she shall hold, in the proportions following: For every share not exceeding ten shares, one vote; for every five shares above ten shares, and not exceeding two hundred shares, one vote; for every ten shares above two hundred shares, and not exceeding one thousand shares, one vote; for every twenty-five shares above one thousand shares, one vote; but no share shall confer a right of suffrage unless it be holden by the person in

whose name it appears absolutely and *bona fide* in his own right, or that of his wife, or for his or her sole use and benefit, or as executor, administrator, trustee or guardian, or in the right of some co-partnership, corporation, or society, of which he or she may be a member, and not in trust for the use and benefit of any other person: Provided, That no persons holding shares by transfer shall be entitled to vote, unless the same shall have been transferred on the books of the company, at least three months before the election; nor shall any proxy be received, or entitle any holder to vote, unless the same shall bear date, and have been duly executed within three months next preceding such election: And provided, in case no election shall be made, or in case of failure to elect, for any cause, the president, and directors, and treasurer of the preceding year, shall hold on and continue in office with full power to act as such until others are elected in their stead: Provided, that said company shall not, by any vote of the stockholders, or the directors thereof, change the gauge of said road from the gauges now established by the provisions of the act of eleventh of March, A. D. one thousand eight hundred and fifty-one, entitled "An act fixing the gauges of railroads in the County of Erie," and the acceptance of this act shall be deemed an acceptance of the said act of eleventh March, one thousand eight hundred and fifty-one: And provided also, That if any company owning, leasing, or using any railroad in said County of Erie, shall construct, alter, lease, or use any railroad of any other gauge of track in any part of said county, east or west of the city of Erie, than is prescribed in the aforesaid act of eleventh March, one thousand eight hundred and fifty-one; then and in such case, all and singular the rights, powers and privileges granted to such company, by any act of Assembly, whatsoever, shall be adjudged null and void.

Exhibit D.

An Act repealing the Acts regulating the gauge of the track of railroads.

Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, that every railroad company heretofore chartered, or which may hereafter be chartered, is hereby authorized to construct or change their gauge or gauges of road to such a width as the Directors of such railroad company may deem expedient, and all laws inconsistent with this provision be and they are hereby repealed.

SMITH SKINNER,
Speaker pro tem. of the House of Representatives.

THO. CARSON,
Speaker of the Senate.

Approved the eleventh day of April, A. D. one thousand eight hundred and fifty-three. WM. BIGLER.

on Ritner Street, for the purpose of giving them access to their wood-house on Penn Street by trains, and for the purpose of enabling them to break up long trains coming into the city, and back their cars on to the north part of their depot lot; therefore,

Resolved, by the Select and Common Council of the City of Erie, That as far as the Mayor, Select and Common Councils have legal power and authority in the premises, the privilege asked for as aforesaid be, and the same is hereby granted upon condition, however, that the said track be so laid and used as to prevent the least possible obstruction to the ordinary travel and business of said streets, and placed as directed by the council, and good planking to be substantially built and kept in repair, both inside and outside the said tracks by the said Railroad Company.

Resolved further, That the said privilege is granted upon the express condition that said city shall not be liable in any form or manner for the damage which any individual may in any way sustain by reason of the laying down or use of said railroad track, but all such damage (if any) shall be paid by the company.

Resolved further, That the Select and Common Councils reserve the right to withdraw the privilege hereby granted, provided the use and occupancy thereof shall appear to them to be injurious to the interests and welfare of said city.

Exhibit C.

Act 14th April, 1852.

Section 14. That the election of president, directors, and treasurer, provided for in the act incorporating the Erie and Northeast Railroad Company, shall hereafter be conducted in the following manner, that is to say: The directors, for the time being, shall appoint two of the stockholders, not being directors or candidates, to be judges of the said election, and to conduct the same, who shall severally take and subscribe an oath or affirmation before an alderman or justice of the peace, well and truly, and according to law, to conduct such election to the best of their knowledge and abilities; and the said judges shall decide upon the qualifications of voters, and when the election is closed, shall count the votes, and declare who has been elected, and make out and deliver a written certificate of the same at all such elections, or other general or special meetings; the stockholders shall be allowed to vote in person or by proxy; and the number of votes to which each stockholder shall be entitled shall be according to the number of shares he or she shall hold, in the proportions following: For every share not exceeding ten shares, one vote; for every five shares above ten shares, and not exceeding two hundred shares, one vote; for every ten shares above two hundred shares, and not exceeding one thousand shares, one vote; for every twenty-five shares above one thousand shares, one vote; but no share shall confer a right of suffrage unless it be holden by the person in

whose name it appears absolutely and *bona fide* in his own right, or that of his wife, or for his or her sole use and benefit, or as executor, administrator, trustee or guardian, or in the right of some co-partnership, corporation, or society, of which he or she may be a member, and not in trust for the use and benefit of any other person: Provided, That no persons holding shares by transfer shall be entitled to vote, unless the same shall have been transferred on the books of the company, at least three months before the election; nor shall any proxy be received, or entitle any holder to vote, unless the same shall bear date, and have been duly executed within three months next preceding such election: And provided, in case no election shall be made, or in case of failure to elect, for any cause, the president, and directors, and treasurer of the preceding year, shall hold on and continue in office with full power to act as such until others are elected in their stead: Provided, that said company shall not, by any vote of the stockholders, or the directors thereof, change the gauge of said road from the gauges now established by the provisions of the act of eleventh of March, A. D. one thousand eight hundred and fifty-one, entitled "An act fixing the gauges of railroads in the County of Erie," and the acceptance of this act shall be deemed an acceptance of the said act of eleventh March, one thousand eight hundred and fifty-one: And provided also, That if any company owning, leasing, or using any railroad in said County of Erie, shall construct, alter, lease, or use any railroad of any other gauge of track in any part of said county, east or west of the city of Erie, than is prescribed in the aforesaid act of eleventh March, one thousand eight hundred and fifty-one; then and in such case, all and singular the rights, powers and privileges granted to such company, by any act of Assembly, whatsoever, shall be adjudged null and void.

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Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, that every railroad company heretofore chartered, or which may hereafter be chartered, is hereby authorized to construct or change their gauge or gauges of road to such a width as the Directors of such railroad company may deem expedient, and all laws inconsistent with this provision be and they are hereby repealed.

SMITH SKINNER,
Speaker pro tem. of the House of Representatives.

THO. CARSON,
Speaker of the Senate.

Approved the eleventh day of April, A. D. one thousand eight hundred and fifty-three. WM. BIGLER.

Exhibit E.

An Ordinance prohibiting the alteration of Railroad Gauges of 19th of July, 1853.

Whereas, by their Act of Incorporation, the Councils of the City of Erie are empowered and required to ordain and enact all such by-laws, rules and regulations as shall be deemed expedient to promote the good order and benefit of the citizens thereof; to regulate, improve and keep in order the streets, and to remove therefrom all obstructions: And whereas, two railroads, the "Erie and Northeast," and the "Franklin Canal Company's Railroad," of diverse gauges or width of tracks, enter into and meet in said city—the gauge of track of the former being six feet, and of the latter four feet ten inches: And whereas, the good order and benefit of said citizens, and the proper regulation of said streets, require that there should be no change in said respective gauges, except as in hereafter provided: Therefore,

First. Be it ordained and enacted by the Select and Common Councils of the City of Erie, and it is hereby enacted by the authority of the same, that the said Erie and Northeast Railroad Company is hereby prohibited from putting down or using any other gauge or width of track, or using any cars or locomotive engine of any other width or gauge of wheels than six feet; and the said Franklin Canal Company are hereby prohibited from putting down or using any other width of gauge or track, or using any cars or locomotive engines of any other width or gauge of wheels than four feet ten inches in said city, under the penalty of five hundred dollars for every such offence, and under an additional penalty of five hundred dollars per day for each day that any track put down or used in violation of this ordinance shall be suffered to remain, or car or locomotive used after prosecution for the first or any subsequent offence: Provided the Erie and Northeast Railroad Company may, if they deem it expedient so to do, put down and use in said city, a track of the width or gauge of four feet eight inches and a half, with cars and locomotives to exactly correspond, anything herein contained to the contrary notwithstanding.

Second. In case any railroad track should be put down on, or across any of the streets of this city, in violation of the provisions of this ordinance, the high constable is hereby authorized and required to cause the same to be forthwith removed off of such street or streets, and he is hereby authorized and required to employ a sufficient force for that purpose.

Third. Each and every resident of this city, is hereby, on request by the high constable, required, under the penalty of five dollars for every neglect or refusal to aid him in the discharge of the duties hereinbefore enjoined upon him; and all persons are hereby prohibited, under the penalty of one hundred dollars for every offence, from re-

sisting or obstructing the high constable, or any person called to his aid, in discharge of the duties above enjoined.

Fourth. Nothing herein contained shall confer or be construed as conferring any rights to construct or maintain in said city, upon or across any of the streets thereof, any railroad track, for the construction and maintenance of which a legal authority does not exist independent of this ordinance.

Ordained and enacted into an ordinance, this 19th day of July, A. D. 1853.

A. KING,
Mayor.

Attest,
W. H. SHERMAN,
Clerk Select Council.
W. THORNTON,
Clerk Common Council.

Exhibit F.

S. C., December, 1853.

Thompson & Grant Griscom 71 St. G. T. C'b'll. W. L. Hirst.	The Com'lth of Penna. ex relatione FRANCIS W. HUGHES, Att'y Gen'l, vs. The Erie & N. E. R. R. Co.	Bill in Equity filed Dec'r 30, 1853, & subpnœa exit ret'ble the first Mon. Feb., 1854. "*Served.*"

March 1, 1854. Exhibits filed to go with the bill for injunction.
13, " The demurrer and answer of the Erie & N. E. R. R. Co. filed.
22, " Replication filed.
July 20, " Depositions on part of respondents filed.
25, " Deposition on part of complainants filed.

Jan'y 12, 1855. On motion of W. M. Meredith, Esq., certain affidavits in support of the writ of assistance granted by the Court in this case were filed nunc pro tunc, viz:—

Affidavit of George Sheldon.
" " Thomas Lennon.
" " William Hinton.
" " D. C. Miller, T. C. Dobson, and Jas. Sutherland.
" " W. P. Gibson, G. W. Wilson, and J. R. Ferguson.
" " T. B. Vincent.

Deposition of Miles Boyles.
" " George W. Wilson.
" " H. H. Briggs.

Jan'y 13, 1855. Affidavit of Thos. W. Dobson, filed nunc pro tunc.
Affidavit of John S. Keyser, filed.
" " S. S. Spencer filed.

Feb'y 26, 1854. On motion of Geo. Griscom, Esq., for complainants, rule on defendants to answer on or before the second Monday of March next.

March 21, 1854. George Griscom and G. M. Dallas, Esquires, solicitors for complainants, move the Court for the appointment of an examiner to take testimony in the above entitled case in the city of Erie and in Erie County, and that the Court do make such order therein as may be according to equity.

March 25, 1854. On motion of Mr. Griscom and Mr. Dallas, the Court appoint James Sill and George Cutler, jointly, to be examiners to take depositions and other evidence in the city of Erie and in Erie County; to be read on the hearing of the above case; and it is ordered that at least ten days' previous notice be given the parties at Erie before commencing to take testimony and that testimony be taken only at one place at the same time.

April 7, 1854. On motion of W. L. Hirst, Esq., that the Court make an order in this case to speed the cause, by directing the testimony on both sides to be closed at any early day to be appointed by the Court, and that in the meantime, all proceedings at law either in the civil or criminal courts at Erie County, wherein the plaintiffs are a party relating to the rights or property of the defendants, be suspended until final decree of the Court, per curiam opinion, motion refused, opinion filed.

July 25, 1854. Argued.

And now, to wit, at Pittsburg, in said Western District, this 7th of September, 1854. This cause came on to be heard before the Supreme Court on the bill of complaint, on the answer of defendants, and on the proofs and evidence taken by both parties, and was argued by counsel; and thereupon it appears to this Court, that the defendants have built and do now use and maintain a certain railroad known as the Erie and Northeast Railroad, a part of which railroad is within the present limits of the city of Erie and upon certain streets thereof, and another part is on the bed of a certain public road known as the Buffalo Road, or Harbor Creek Township, Erie County; and that the said railroad in those parts thereof is a public and common nuisance; it is therefore ordered, adjudged, and decreed, that the defendants shall, on or before the expiration of four months from this date, break up so much of their said road as lies upon their said streets, and upon the Buffalo Road, and remove the materials thereof, so as to leave the said streets and road in as good condition as they were in before the construction of said railroad; and it is further declared and adjudged, that the said defendants are bound to make the borough of Erie with such limits as it had in 1842, the western terminus of their said road. It is, therefore, decreed and ordered, that the said defendants shall, within four months from this date, change the route and construction of their railroad accordingly, and make their western terminus at what was the eastern line of the said

borough in 1842, or within the said borough; and the said defendants shall reconstruct their railroad, to supply the parts hereby ordered to be broken up, according to plans and specifications, to be by them made and to be submitted to and approved by this Court on full notice to the counsel of the commonwealth, and not otherwise; and the defendants shall pay all lawful costs to be taxed by the prothonotary.

Oct. 14, 1854. Certificate of Prothonotary of the Western District, filed in words following, to wit: Oct. 6, 1854. It is ordered that the Prothonotary of the Eastern District be and hereby is directed to certify the record and proceedings in this case to the Prothonotary of the Western District without delay.

Record, &c., certified and sent as directed.

And now, to wit, Nov. 2, 1854, at the present term come the defendants by their counsel, and after due notice presents to the Court plans and specifications for a proposed alteration of the route and location of their road, so as to enter the borough of Erie as the same was in 1842, at Twelfth street, along the course designated in said plan, which is placed on file. And the said defendants also present a plan for a proposed change of the route and location of their road where it interferes with the free use of the Buffalo road at Harbor creek, as designated in a plan on file—which said plans were excepted to on the part of the Commonwealth and argued by counsel, and the exceptions and arguments of counsel being heard, and the Court fully advised in the premises, the Court do find the plans and specifications first mentioned, the change in the route and location of said road at the borough of Erie, to be in conformity with the charter of defendants, and the decree of this Court heretofore made, and do approve the same.

And the Court find the plan of the proposed change at Harbor creek, where it occupies 800 feet of the Buffalo road, not to be in conformity with the charter of defendants and the decree of the Court, and to disapprove the same, approving it in other respects. By the Court.

December 19, 1854. The defendants in this cause having submitted to the Court another plan for a change of their railroad at a place where it interferes with the Buffalo road. It is ordered that the said plan be filed, and seeing no reason to believe that by this plan the Buffalo road will be illegally interfered with, or its free use be obstructed or impeded within the meaning of those words as used in defendant's charter, we approve it. The said defendants have also moved by their counsel for an extension of the time within which the decree required them to complete the change in their work, and we think it reasonable that the time should be extended. It is therefore ordered that 60 days further time after 7th day of January next ('55), be allowed the defendants to do the acts and things which the said decree requires them to perform. This approval of the plan and extension of the time for executi.. it, does

not and cannot in any manner or degree affect the question, whether the right to make the railroad has been forfeited by the fact that it was not properly made within the time mentioned in the charter. If anything in this whole proceeding can have any influence on that question it was the original decree, and not the orders made at different times concerning the mode of its execution. By the Court, Lowrie and Knox, Judges, dissenting.

Jan'y 9, 1855. Affidavit of W. Case filed, and W. L. Hirst, St. G. T. Campbell, Wm. M. Meredith, Esqs. move for a writ of assistance.

Jan'y 10, 1855. Affidavit of Wm. Case filed.

" " " Motion for writ of assistance argued.

" " " It is ordered that a writ of assistance to John S. Keyser, or to some person to be by him deputized, issued, commanding him by all lawful force and means to protect the property and railroad of the Erie and Northeast Railroad Company, and to protect the officers, agents and servants thereof in restoring and replacing the said railroad in the same condition and position of which the same was when the last order and decree in this Court in this cause was made, and to maintain the said Company in the possession thereof—Knox, J., dissenting—Reasons filed.

Jan'y 12, 1855. On motion of W. M. Meredith, Esq., certain affidavits in support of the writ of assistance granted by the Court in this case be filed nunc pro tunc.

Feb'y 3, 1855. Wm. Meredith, W. L. Hirst, and St. G. T. Campbell, Esqs., defendants' counsel, move for an extension of time to comply with the order and decree of the Court of September 7, 1854, and the Court order the motion to be heard on Saturday, February 17, 1855, at 10 o'clock A. M. February 17, 1855, motion argued, affidavits on part of complainants read and filed.

February 17, 1855. Wm. Meredith, W. L. Hirst, and St. G. T. Campbell, Esqs., for the defendants move for the following order. Inasmuch as a bill has been filed in this Court by the C. P. and A. Railroad Company against the city of Erie, whereby it is claimed that lawful authority is given to the said Company to connect with the railroad of the defendants, and whereas upon the final hearing of the said cause, this question with the others therein pending will be finally determined by this Court, and inasmuch as great injury will be done by interrupting the connection of said road,

It is, therefore, ordered that the time for the execution by the defendants of the decree of this court of the 7th of September last, be and it is hereby extended until the expiration of ninety days from this time: Provided, that the said decree of the 7th of September, so far as the road at Harbor Creek is therein referred to, shall be executed within thirty days from this date. Knox, J., not agreeing to to said decree.

March 17th, 1855. It is ordered that the time for executing the decree of the Court in reference to the Harbor Creek part of the de-

fendants' road be extended until the third Monday in May next, and that the other part of the motion is refused. The writ of assistance to remain in force as before in regard to the existing road. Lowrie and Knox, J., dissenting.

April 7th, 1855. Defendant's Counsel move the Court for awarded that the execution of the decree of the Court in regard to the removal of the defendants' road in the City of Erie be postponed until ninety days after the final decision of this cause. Motion argued. *Eo die per curiam.* Motion for admonitory order refused. Opinion filed.

April 10th, 1855. Motion that the Court make an order that the execution of the decree of the Court in regard to the removal of the defendants' road in the City of Erie be postponed until ninety days after the final decision of this Court. Refused.

And now, to wit, May 17th, 1855. It is moved that the time for executing so much of the decrees of this Court in reference to that portion of respondent's railroad that lies west of Ash Lane in the city of Erie be extended until one month after the argument and discussion in this Court upon the bill No. 7, of December term, 1854. The Cleveland, Painesville, and Ashtabula Railroad *vs.* The City of Erie *et al.*

21st May, 1855. Motion allowed. Knox, J., and Lowrie, J., dissenting.

Exhibit I.

An Act to repeal the charter of the Erie and Northeast Railroad Company, and to provide for disposing of the same.

Whereas, on the twelfth day of April, A. D. 1842, an act was passed by the General Assembly of this Commonwealth, entitled "An Act to incorporate the Erie and Northeast Railroad Company, and for other purposes," to construct a railroad from the borough of Erie to the east boundary of the township of Northeast, being the New York State Line:

And whereas, by the tenth section of the said act it was enacted that "if the company aforesaid do not complete the work so as to bring it into use within ten years after the passage of the said act or shall suffer the same to go into decay, &c., then the charter shall become null and void: and by the eleventh section of the same act it is provided that if the said company shall misuse or abuse any of the privileges thereby granted, the legislature might resume the rights and privileges so granted to the said railroad company.

And whereas, it had been judicially determined at the last September term of the Supreme Court of this Commonwealth, sitting in and for the Western District thereof, that the said Railroad Company have not completed their said road between the points named and fixed in said charter up to and at the time of said decision, although the period in which the same was to be finished and brought into use had expired on the twelfth day of April, A. D. 1852, and

that the said company have violated its charter in assuming to make an unauthorized and illegal location of the said road, it is now therefore the solemn judgment of this legislature that by reason of the omission to complete and bring into use, the said road within the period aforesaid by reason of the said acts in violation of the charter aforesaid, the said charter so granted to the Erie and Northeast Railroad Company has become entirely null and void, and in pursuance of the right reserved to the Commonwealth in the said act of incorporation to resume all and singular the privileges and franchise granted to the same, now forfeit, for remedy whereof.

Section 1. Be it enacted by the Senate and House of Representatives in General Assembly met, and it is hereby enacted by the authority of the same, That all and singular the rights and privileges heretofore granted to the Erie and Northeast Railroad Company, by the Act of Assembly authorizing the Governor to incorporate the same, passed the twelfth day of April, A. D. 1842, or by any act of the General Assembly supplementary thereto, be and the same are hereby revoked and utterly and forever annulled.

Section 2. That the Governor of this Commonwealth be and he is hereby authorized and directed to take such measures as may be deemed necessary for the enforcing and carrying into effect the provisions of the foregoing section, together with all and singular such incidents or consequences as may legally attach to the revocation aforesaid, and to take possession of, or cause to be taken possession of, the said railroad, so far as the same has been constructed, and to appoint a suitable person or persons, to take the charge and custody thereof until the same shall be further disposed of according to law; and the compensation of such person or persons so appointed as aforesaid shall not exceed the rate of fifteen hundred dollars per annum.

Section 3. That it shall be the duty of such person or persons so to be appointed by the Governor to take possession of and keep in repair and good running order the said railroad for the accommodation of the public travel and business, at rates not greater than heretofore charged, and to deposit the net revenues thence to be derived in such banks as may be designated by the Governor, at least once in every week, not to be drawn thereout without checks countersigned by the Governor; and any accumulation of such money shall be invested in the loans of the State of Pennsylvania, in the name of the Governor, under the trust of this act, and such person or persons so to be appointed shall give adequate security to cover any moneys that shall come into his or their hands: Provided, That the trust upon which such revenue or collections or the investments thereof made as aforesaid shall be to hold and dispose of the same as the Legislature of the Commonwealth may hereafter declare and enact, subject to any rights or obligations which may exist.

Section 4. That it shall be the duty of any sheriff of any county of this commonwealth, and of all good citizens thereof, whenever

warned or required by the Governor or the person or persons so by him appointed as aforesaid, to aid and assist in the discharge of the aforesaid service, and they shall be and are hereby indemnified by the commonwealth, in all they shall lawfully do under and in obedience to such requisition and command.

Section 5. That as soon after the Governor shall have caused possession to be taken of said road, under this act, as practicable, he shall cause notice of the same to be served on the president of the said company, personally or by copy, to be left at the office of the same, and it shall be lawful for him, and he is hereby authorized to restore the possession of the said road to said company on the following conditions, which said conditions the said company on accepting the same, shall, by a vote thereof, enter on their books as conditions of the renewal of their charter, and in consideration of the privileges hereby granted to them:

1. The said company shall, by a proper divergence of not less than one mile east of the limits of the City of Erie, construct and extend their road to the Harbor of Erie, on such level and in such manner as to permit sidelings or tracks to the wharfs or docks convenient for the transportation of merchandise and freight to and from vessels and steamboats.

2. That said road so extended shall be constructed and finished by the time fixed by law wherein the Cleveland, Painesville, and Ashtabula Railroad Company are bound by law to extend the track or tracks of their road to the harbor aforesaid, and to be commenced within three months from the date of this act.

3. That the said company shall, on the completion of the road to the harbor as aforesaid, change the gauge thereof, from thence to the New York State line to a uniform gauge of four feet eight and a half inches or six feet, at their option, and maintain the same thereat.

4. That the said company may maintain the said road as it is now located at and in the city of Erie until the time fixed as aforesaid for the completion of their road to the harbor aforesaid, when they shall remove the same, together with all bridges, embankments, and superstructures from the said point of divergence to the present terminus of the said road, leaving the ground, streets, and alleys free and clear from the same.

Section 6. That on the acceptance of the terms of this act as heretofore provided and in a manner satisfactory to the Governor, then and in that case all the rights, privileges, and franchises granted and conferred on said company by the act of incorporation, passed the twelfth day of April, A. D. 1842, are hereby re-enacted and conferred on the same, as fully as by said act they were originally granted and conferred, and the said company may at any time after commencing work to extend their road as aforesaid to the harbor of Erie, increase their capital stock to the extent of four thousand shares, but before doing so the said company, by its president,

shall cause to be certified under the seal of said company and filed in the Auditor-General's office, the acceptance of this act by the company and its resolution agreeing to be bound by the same.

Section 7. That from and after the expiration of the time limited for the completion of the Erie and Northeast Railroad to the harbor aforesaid, all connection south of said harbor with any road running westwardly shall at once cease, and no such connection shall be permitted at any other point than at the harbor aforesaid.

Section 8. That no action heretofore brought or hereafter to be brought by or against said company for cause of action existing before the passage of this act, shall abate because of this act, but the same shall be prosecuted with like force and effect as though this act had never been passed.

Section 9. That from and after the passage of this act there shall be charged and paid to the commonwealth a tax of five cents on each passenger and ten cents per ton on all freight passing east on said road, to be returned and paid in the same manner as the tax on tonnage on the Pennsylvania Railroad is now returned and paid to the commonwealth.

Section 10. That if the governor takes possession of said road, then and in that case he is hereby authorized and required to apply the net proceeds of the same, after paying ordinary expenses, towards the liquidation of the existing indebtedness of the said Erie and Northeast Railroad Company.

HENRY K. STRONG,
Speaker of the House of Representatives.

WM. M. HEISTER,
Speaker of the Senate.

Approved the 6th day of October, A. D. 1855.

JAMES POLLOCK.

And afterwards, to wit, on the eighth day of January, in the year of our Lord one thousand eight hundred and fifty six, the plaintiffs appeared by their solicitors, and the defendant, as well by his counsel as in his own person, the cause came on for hearing upon the bill and exhibits filed by complainant, and being argued by counsel was submitted to the Court.

And afterwards, to wit, on the 28th day of January, in the year last aforesaid, it was ordered, adjudged and decreed that the injunction prayed for in complainant's bill of complaint be refused—his Honor Judge Black delivering the opinion of a majority of the Court. Thereupon the several Judges of the Court delivered and filed their separate opinions in the words and figures following, to wit:—

ERIE AND NORTHEAST RAILROAD COMPANY
vs.
JOSEPH CASEY.

In Equity.

Opinion of Majority by Judge Black.

The Erie and Northeast Railroad Company was incorporated in 1842. The charter was repealed at the last session of the Legislature, and the Governor was authorized to appoint some suitable person to take charge of the road which the company had built, and keep it in good running order and repair, for the use of the public. The defendant was appointed under this provision of the repealing law, and he avows his intention to take possession of the road accordingly, unless prevented by the injunction of this Court. To obtain such an injunction is the object of this bill. If the company be threatened with an *illegal* injury, we may protect it in this form of proceeding. If the defendant be justified by *law* the complaint must be dismissed.

What the defendant means to do is to execute the plain mandate of the supreme law-making power of the State; to convey into effect an Act of Assembly, passed in regular form. This act, if it be law at all, is paramount to all other law on the subject, and must be obeyed. If, however, the Legislature had no *power* to pass it, then it is wholly void, and we must regard it as if the place it occupies on the statute book were a blank.

The right of the judiciary to declare a statute void, and to arrest its execution, is one which, in the opinion of all courts, is coupled with responsibilities so grave that it is never to be exercised except in very clear cases; one department of the government is bound to presume that another has acted rightly. The party who wishes us to pronounce a law unconstitutional, takes upon himself the burden of proving, beyond all doubt, that it is so.

It is also very well settled that no statute is unconstitutional merely because it is wrong in policy or principle. It is not enough to prove that it is contrary to a sound public morality, or injurious to private rights. Inconsistency with rules of law or principles of equity, will not make it void. Nothing will have that effect but a *direct* collision between its provisions and those of the Federal or State Constitution. For this proposition I have no authority or reasons to offer beyond what are already on record in the case of *Sharpless* v. *The City of Philadelphia.*

The plaintiffs' counsel assert that the act of 1855, under which the defendant proposes to take the railroad into his possession, impairs the obligation of a contract. The Constitution of the United States (Art. I., Sec. 10), and that of Pennsylvania (Art. IX., Sec. 10), forbid the making of any law impairing the obligation of contracts.

An act granting corporate privileges to a body of men is, when accepted, a contract between the State and the corporators. It is not worth while now to try whether this doctrine will stand the test of original principles. It is sustained by everything that we are bound to regard as authority by the decisions of all the courts in the country, by the opinion of the legal profession, and by the general acquiescence of the people. It is not denied by the defendant or his counsel, or by anybody else who has attempted to sustain the action of the Legislature in this case. Being a contract it cancannot be rescinded by the act of one party without the consent of the other. A grant of corporate privileges for a specified period cannot be resumed by the State within such period. If the charter be without limitation as to time, it is forever irrepealable.

It does not follow from this that corporations are beyond the reach of public control. When the privileges they enjoy are fraudulently abused, the courts may pronounce them forfeited. In some cases also, the legislature, when granting the franchises, reserves to itself the right to revoke them. When the charter contains such a stipulation it is as much a part of the contract as anything else that is in it. The legislative repeal of such a charter bears no resemblance to the judgment of a court against the corporation on a *quo warranto*. They proceed upon principles as different as the functions of the Legislature are different from those of the judiciary. If the power to repeal be reserved its exercise is merely carrying out the contract according to its terms; and the State is using her own rights; not forfeiting those of the company.

The power to repeal is sometimes reserved absolutely, so that the franchises of the corporation may be revoked whenever the Legislature shall think proper. It is sometimes reserved conditionally; to be exercised only in case a certain event shall happen. The event may be one which the corporators could not control, or it may be such a one as could not occur without some default of their own. In either case the charter is repealable when the event happens.

In the charter now under consideration, the following clause occurs: "If the said Company abuse or misuse any of the privileges hereby granted, the Legislature may resume the rights granted to the said Company." This was a reservation of the right to repeal the charter in case it should be violated. If it was violated, then the repeal was not breaking the bargain but keeping it; not *impairing*, but *enforcing* the obligation of the contract.

The plaintiffs' counsel insist that inasmuch as the right to repeal depended on matter of fact, the right could not be exercised until the fact was ascertained by a judicial trial. But if this were not a mistake the reservation would be nugatory. When the abuse of a charter is judicially ascertained the corporation will be dissolved without the intervention of the Legislature, and the Court could not decide the fact to be true without pronouncing the judgment of forfeiture. The Legislature certainly meant to reserve something more

than the right to dissolve the corporation after it shall be dissolved by a court. The power to kill what is already dead is no power at all. The argument of the plaintiffs on this point is altogether unsustained by authority. There are several cases directly against it. In *Crease* v. *Babcock* (23 Pick. 234), the Supreme Court of Massachusetts said, that when the Legislature reserved to itself the right to repeal a charter on the happening of a certain event, they might enact the repeal whenever the event happened; it was not a reservation of judicial power. To the same effect is *McLarren* v. *Pennington* (1 Paige, 107), and in the *Miners' Bank* v. *The United States* (1 Greene, 561), it was held, not only that the fact, on which the right of repeal depended, might be noticed by the Legislature without the assistance of the judiciary, but that its truth could never afterwards be questioned by any court. Without intending to endorse the whole doctrine of the last mentioned case, we are very clear that the right to repeal vests in, and may be exercised by, the Legislature whenever the event occurs upon which they stipulated for the right. The most that can be said is, that the repeal is void if it comes before the event. If the corporators desire to contest the validity of the repealing act in a court, they must at least prove that the event did not occur.

This view of the subject makes it important that we should see whether the privileges of this company were abused or misused. Did the corporators violate the charter? We are obliged, as the case now stands, to answer the question in the affirmative. For that answer we have three reasons, either of which would be sufficient without the others. In the *first* place, we are bound to take an Act of the Assembly to be constitutional until the contrary is shown. In the absence of evidence, we presume the existence of every fact on which the validity of the law depends. *Secondly:* the plaintiffs' bill does not aver that they performed their duties according to the terms of the charter; and this they certainly would have averred if they could safely have done so. *Thirdly:* a record of this Court is referred to in the bill, and produced in evidence, from which it appears that a decree was pronounced against them for fixing their terminus at a place not authorized, and for locating their road on streets and other highways in a manner expressly forbidden.

It is said that the repeal can be justified only if the violation of the charter was wilful. But the right is given to repeal not for a wilful, but for any abuse or misuse. The word *wilful* is not in the reservation, and we cannot insert it by construction. But suppose it to be in. Is not any positive violation of the charter, which might have been avoided, a wilful misuse and abuse of it? They were not *forced* to lay out their road contrary to the plain directions of the law. Neither can we believe it to have been a mere blunder. The difference between what they were required to do and what they did do was too obvious and too important to be overlooked by men who could read and understand English.

After this abuse and misuse was committed, the Attorney General for the State filed a bill complaining of it; and upon hearing, we made the decree already referred to, and enjoined the company to take up and remove the railroad to a location which would be conformable to the charter. This decree has been partially obeyed.

While the charter stood unrepealed, it was a law of the State, and, as such, it was the duty of the Attorney General to see that it was executed faithfully. Nor was it possible for us to decree otherwise than according to the law as it then was. But how did this proceeding affect the right of the Legislature to take away the charter? The company's counsel say that it was a waiver of the right to repeal—that the State is equitably estopped by it from using the power of revocation which she otherwise would have had.

It is well settled that a forfeiture, however incurred, is to be considered as waived, if the party entitled to exact it has chosen to right himself in some other way. If a tenant, for instance, should forfeit his estate by a breach of covenant, the landlord could not accept compensation and afterwards re-enter. When the State comes into Court demanding a forfeiture, the principle applies to her with as much force as it does to a private party.

But we are now dealing with an Act of Assembly, which, if it be valid, is the paramount law of the subject to which it relates. It rides down and nullifies all other laws which are inconsistent with it. Perhaps this is the very first argument, that ever was made, to show that a statute was void because it conflicted with a rule of the common law. To change the common law, and repeal earlier statutes, is the main, if not the only, business which the Legislature has to perform. A statute may be valid, no matter how inconsistent it is with the doctrine of estoppel, unless the doctrine of estoppel be a part of the Constitution, which it certainly is not. When we are inquiring what the Legislature *can* do, we are not helped a particle by being told what a Court *would* do. When we are considering whether a statute ought to be obeyed or disregarded, it is very unsatisfactory to be informed how the law stood a hundred years before the statute was passed. Judges and chancellors have established certain rules of proceeding for their own guidance in the distribution of justice among suitors. One of these rules is, that a party in certain cases shall not be permitted to aver the truth; and this is called an estoppel. But the Legislature is not restricted by it. The General Assembly can make and unmake all rules of practice, pleading, and evidence, at its pleasure. The power that makes the law must, in its nature and essence, be so totally different from the power which administers the law, that it is most illogical to reason from one to the other. The limitations on the legislative power of the State are not to be found in the general body of the law, but only in the Constitution itself, which is the *lex legum*, or law of laws.

We must, therefore, fall back upon the Constitution, to see whether there is anything there to prohibit the Legislature from passing

the Act in question. The instrument declares that no law shall be made impairing the obligation of contracts. This charter was a contract; but one of its terms was, that it might be repealed if it should be abused or misused. The corporators did abuse and misuse it, and thus they placed themselves in the mercy of the Legislature. Did the atonement which they were compelled to make for their default restore them again to the condition in which they would have remained if they had never been guilty of it? They had a charter, irrepealable if they would obey it, and they were independent of the Legislature. But they fell from that estate by disobedience, and their charter became repealable. Did it become irrepealable again when they were forced by this Court to undo the wrong they had committed.

These corporators have suffered at the hands of the Legislature nothing but what they expressly agreed to suffer in a certain contingency. That contingency has literally come to pass. Their privileges have been abused and misused. But they insist that the penance they were forced to undergo ought to be accepted in place of the obedience which they promised. That is not in the bargain; and since they stand upon their contract, we do not see how we can give them more than what is there set down. The Legislature agreed to disarm itself of the repealing power on condition that the corporators would remain and abide within their charter; when they went out of it, the condition was broken. The fact that they left the path of duty is not disproved by the other fact that they afterwards returned to it. Nor is their case at all helped by showing that they were *driven* back under the lash of a Court. Their independence of legislative control was to be a consequence of innocence; not of guilt, followed by repentance and restitution.

The most important privilege and highest immunity which a corporation can enjoy, is that of holding its franchise by a tenure above the reach of the law-making power, which regulates everything else in the State. When this immunity is bestowed on certain conditions, the conditions cannot be changed without changing the charter, and no such change can be made except by the express and plain words of the Legislature. This corporation claims to hold the immunity, and for its title it points to a bill in equity filed by the Attorney-General, and to a decree of the Supreme Court, and to its own act of removing the road. But the corporation itself cannot add anything to the charter, nor can it do so even with the assistance of the executive and the judiciary. It still has no more than what the Legislature gave it, and the Legislature did not give it what it now claims.

Another and still plainer view of the argument based on the law of estoppel may be taken. It is a familiar and well established rule of constitutional law that the prohibition to impair the obligation of contracts is not applicable to an act of Assembly, unless it violates directly some right secured by an existing contract, bargain or agree-

ment. That provision does not protect from legislative interference other rights acquired or created in other ways. Here, now, is an act of Assembly which enforces one of the stipulations of a contract between the State and a corporation. The corporators say to the Legislature, "You shall not do this thing. We admit that your act is according to the very terms of our agreement; but certain facts and circumstances have occurred since which bind you in justice, equity and law, to abstain from taking advantage of the agreement." The short and conclusive answer of the Legislature is this: "To enforce a contract is not to impair it, and whatever the obligations may be which arise out of the subsequent facts, it is enough that they are not obligations of the contract."

A harder task cannot be imagined than that of proving the law before us to be void on the ground contended for. The argument would have been successful, if there had been anything in the constitution to forbid the carrying out of contracts. It might not have been a failure, if the obligation of contracts could be interpreted to mean all obligations of every kind, however created. And it would probably have been triumphant if counsel could have shown that the power which is given to the Legislature by the constitution is taken away by rules of Court.

A better objection is made to the validity of this law by contending that the contract ought to be so extended by construction in favor of the corporation as to give the right of repeal only for an abuse or misuse, which shall be persisted in down to the time when the repeal is enacted. We have said, however, that this cannot be done. We are clear in our conviction that the right of repeal, under such a reservation, can be successfully denied only when the corporators are able to show that no abuse was *ever* committed. It was not a right which existed merely while the corporators were in a state of rebellion against the law, to cease when they put themselves, or were put by the Court, on their good behavior.

A more plausible proposition than either of these would be to say that the proceedings against the corporation in the equity suit *implied a new contract*, by which the State promised not to repeal the charter for any past offence. The counsel did not take this ground, doubtless because they thought it untenable. We concur in their opinion. Contracts between the State and corporate bodies cannot be implied from anything but plain words; and those words must be spoken by the General Assembly, and enrolled in solemn form among its acts.

On the 14th of April, 1852, and after the violation of the charter, the Legislature passed a supplement to the charter, changing the mode of electing officers. Whatever new powers, immunities and privileges were granted by this supplement may be lawfully claimed, but all that were not plainly granted were withheld. It was certainly a legislative recognition of the Company's existence as a corporate body; but it was no recognition of its *right* to exist upon

terms and conditions which are not mentioned in the supplement, and which are expressly excluded by the words of the original charter. The Assembly might then, or at any other time, have made the franchise irrevocable by saying that such was its will. But it did not do so: it merely said that the stockholders should vote in a manner different from that in which they had voted before.

We think the construction we have given to this reservation is not only required by the established rules of interpretation, but is in accordance with the most liberal intent that can be ascribed to the Legislature in making it. Men who are capable of abusing a privilege conferred on them by the special favor of the State are unworthy to have it. The State had a right to test the prudence of her bounty by this standard—to fix her own *locus penitentiæ*—to try the grantees of the privilege and see whether they would behave themselves well. She kept in her hands the short, sharp remedy of repeal, to be applied whenever the conduct of the corporation would demonstrate that a remedy was needed. The error was to be repaired by the same body that committed it at any time after the error was ascertained. For the same offence, the charter might have been forfeited on *quo warranto*, but another mode of reparation was adopted for the very reason that the State did not choose to undergo the risk, and embarrassment, and delay of a judicial trial. She would not have the machinery of a Court interposed between her and her rights. She did not desire to play with lawyers and judges at the game of special pleading. She was unwilling to go for justice to a place where estoppels might prevent her from asserting the truth. She would retain the right of legislative repeal free from all restraints but those imposed by the constitution, or else she would not grant the charter. If the corporators did not intend to obey it when such was the stipulated penalty for disobedience, it was folly as well as wickedness to accept it.

The authority given by the Act of October, 1855, to the defendants to take possession of the railroad is asserted by the plaintiffs' counsel to be an act of confiscation—a taking of private property for public use without compensation. If this be true, the injunction ought to be awarded; for no Legislature can do such a thing under our constitution. When a corporation is dissolved by a repeal of its charter, the Legislature may appoint, or authorize the Governor to appoint, a person to take charge of its assets for the use of the creditors and stockholders; and this is not confiscation, any more than it is confiscation to appoint an administrator to a dead man, or a committee for a lunatic. But money, or goods, or lands, which are or were the private property of a defunct corporation, cannot be arbitrarily seized for the use of the State without compensation paid or provided for. This act, however, takes nothing but the road. Is that private property? Certainly not! It is a public highway, solemnly devoted by law to the public use. When the lands were taken to build on they were taken for public use; otherwise they

could not have been taken at all. It is true the plaintiffs had a right to take tolls from all who travelled or carried freight on it, according to certain rates fixed in the charter, but that was a mere franchise; a privilege derived entirely from the charter, and it was gone when the charter was repealed. The State may grant to a corporation, or to an individual, the franchise of taking tolls on any highway, opened or to be opened, whether it be a railroad or river, canal or bridge, turnpike or common road. When the franchise ceases by its own limitation, by forfeiture, or by repeal, the highway is thrown back on the hands of the State, and it becomes her duty, as the sovereign guardian of the public rights and interests, to take care of it. She may renew the franchise, give it to some other person, exercise it herself, or declare the highway open and free to all the people. If the railway itself was the private property of the stockholders, then it remains theirs and they may use it without a charter as other people use their own—run it on their own account—charge what tolls they please—close it or open it when they think proper—disregard every interest except their own. The repeal of charters on such terms would be courted by every railroad company in the State; for it would have no effect but to emancipate them from the control of law, and convert their limited privileges into a broad, unbounded license. On this principle, a corporation might be rewarded, but never punished, for misconduct. Repeal of its charter, instead of bringing it to a shameful end, would put "length of days in its right hand, and in its left hand riches and honor." But it is not so. Railroads made by the authority of the Commonwealth upon land taken under her right of eminent domain, and established by her laws as thoroughfares for the commerce that passes through her borders, are her highways. No corporation has any property in them, though corporations may have franchises annexed to and exercisable within them.

Such a franchise the plaintiffs had, but they have it no longer. The right to take tolls on a road is an incorporeal hereditament, which may be granted to a corporation or to an individual; and the grantee has an estate in the franchise. But what estate? The estate endures forever if the charter be perpetual; for years, if it be given for a limited period; and at will, if it be repealable at the pleasure of the Legislature. This corporation, after its privileges were abused, had an estate at will, and the Commonwealth chose to demand repossession. That terminated the estate as completely as an estate for years would be terminated after the expiration of the term. The grant was exhausted, the corporation lived its time out. Its lease of life was expressly limited, at the day of its creation, to the period when the Legislature should dissolve it for misconduct. When the legislative will was spoken its hour had come. Having no right to keep the franchises any longer, it would be absurd to claim compensation for taking them away. To say that the stockholders have a right to compensation for the franchises, because they

are wrongfully taken, and that they were wrongfully taken because they have a right to compensation, would be reasoning in a very vicious circle. If the stockholders had a right to retain the franchises, the charter could not be repealed at all, with or without compensation. If they had no right to retain them, they have no claim to compensation.

A brief recapitulation of the main points in the case may serve to make the grounds of our judgment somewhat plainer.

I. This charter was granted with a reservation of the right to repeal it, if the franchises should be abused or misused.

II. We are satisfied that, in point of fact, those franchises were abused and misused.

III. After that event happened, the General Assembly was invested with full power to repeal the charter, and the corporators held their franchises from the State merely as tenants at will, in the same manner as if there had been an unconditional reservation of the right to repeal.

IV. After the interest of the corporators had been thus cut down by their own misconduct to an estate at will, the Legislature only could enlarge the charter, so as to make it a perpetual grant, or put the corporators on another term of probation.

V. The judicial proceedings against the corporation did not and and could not disarm the Legislature of its reserved right to repeal, nor enlarge the estate of the corporation in its franchises, nor change the terms of the original grant, for these are things which the judiciary cannot do, nor the executive either.

VI. The power of the Legislature is not restricted by the rules of pleading and evidence which the Courts have adopted; and therefore the State may act in the Legislature upon a truth which she would have been estopped to show in a Court if the Legislature had not interfered.

VII. The power to repeal for abuse of corporate privileges is a different right from that of demanding a judicial sentence of forfeiture, and is reserved for the very reason that it may afford a remedy when a *quo warranto* would not.

VIII. The charter being constitutionally repealed, the franchises are, as a necessary consequence, resumed to the State, and the road remains what it always was—public property.

IX. The corporators cannot be entitled to compensation, for they had no property in the road, and after their default they held the corporate franchises at the will of the Legislature, and the exertion of that will, in the resumption of the franchises, did them no injury but what they agreed to submit to.

The injunction which the plaintiffs have moved for is to be refused.

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ERIE AND NORTHEAST R. R. Co.
vs.
JOSEPH CASEY.

LEWIS, C. J., Dissentient.

That a private corporation, when accepted and capital expended on the faith of it, is a contract, is too well settled to be denied. That a charter for the construction of a railroad is a private corporation is equally well settled. That the obligation of a contract cannot be impaired by a State is a principle to be found in the constitutions of the United States and the State of Pennsylvania. It follows that a charter granted to a Railroad Company, thus accepted and acted on, cannot be annulled against the consent and without the default of the corporators judicially ascertained and declared, unless the power be reserved in the grant. 4 Wheat. 518; 6 Cranch, 88; 7 id. 164; 9 id. 43; 6 W. & S. 101; 6 Barr, 86, 379; 7 Harris, 151; 7 Pick. 344. The arguments founded on the inconveniences to the public which might flow from a power in one Legislature to bind another, have their origin in an inattention to the eminent domain which rests in every sovereignty. Under that power a State may resume grants of lands, franchises, or any other private property, whenever the public interest requires it. But in such cases the resumption must always be accompanied with just compensation to the party injured thereby. It is not pretended that the charter of the Erie and Northeast Railroad Company has been taken under this power, or that any compensation has been given or offered to the corporators. The act of 6 Oct., 1855, professes to annul it either under some general claim to judicial authority, or by virtue of a power reserved in the contract. The reservation is in these words: "If the said Company *misuse or abuse* any of the privileges hereby granted, the Legislature may resume the rights and privileges hereby granted to said Company." The reservation is upon condition. But who is to judge whether the contingency upon which it depends has or has not occurred? The act is silent on this point. There is not the slightest intimation that the question of "abuse" or "misuse" is to be adjudicated by the Legislature. There is no provision for any notice or trial before that body. Notice to the party accused and an opportunity for a fair trial and a full hearing is so indispensable to the validity of a judicial sentence that it may be presumed that these essentials would have been provided for, if the intention had been to give to the Legislature the power to try and determine the question. As the Legislature possesses no judicial authority under the constitution, and have no established course of proceeding in the exercise of such a power, it is also reasonable to presume that in all cases where it was to be conferred by contract the instrument conferring it would also prescribe the course of trial. This, of course, would not be indispensable if the power be clearly reserved. Where an unconditional right

of repeal is reserved no trial is necessary, and the repealing act is valid without it. This was the case of McLarren *v.* Pennington, 1 Paige, 108. So also where an unlimited right of repeal "at the pleasure of the Legislature" is reserved, no trial is necessary; and a proviso that the power is not to be exercised "unless for some violation of the charter or other default" is not a limitation of the power which remains complete, by the terms of the contract, to be regulated only by "the pleasure of the Legislature. This was the case of Crease *v.* Babcock, 23 Pick, 342. It is true that the counsel have found one case in Green's Iowa Reports, 561, where the territorial legislature, at a time when "the territorial courts were imperfectly organized in legal proceedings," adjudicated upon a forfeiture under a power reserved to vacate the charter in case of abuse or misuse; and that proceeding was sustained. The "disorganized condition of the courts" of the territory at the time the legislative action occurred was assigned by the court as one reason for the decision. The authority of Crease *v.* Babcock, 23 Pick, 340, was relied on as another, although, from what has been said, it is manifest that it gives no support to such a proceeding; and lastly, it was thought absolutely necessary to construe the reservation as giving the Legislature the power to adjudicate on the misuse or abuse, in order to give effect to it, and that it meant nothing without it. If this were true it would not give the legislature the power to adjudicate where it has not been reserved by the contract. But it is a very gross error to suppose that the reservation means nothing without giving it this enlarged construction. The evil which would have existed without it, was that the corporation, at common law, might have continued to exist, with full power to practise its abuses, until arrested in its career by a judgment of ouster. This could not be obtained without the delay incident to all legal proceedings. But a repeal, if valid, put an immediate stop to its abuses, so that all its acts afterwards would be null and void, and all parties would be bound to take notice of the repeal. But the validity of the repeal was still a question which it had a right to have decided according to law, in any direct proceeding for the purpose. If its validity depended upon the existence of abuses, it had a right to demand a trial, and to call for the proofs, before it could be deprived of its possessions. If the abuse was established, its charter was gone from the time of the repeal, and its immediate acts were void. But if the contingency upon which the right of repeal depended did not exist, the repeal, of course, would be inoperative. This is the construction which such a reservation would receive in contracts between individuals, and there is no propriety in adopting a different rule for contracts with the State. All parties stand on equal footing in a Court of justice. If a landlord reserves the right to enter upon the tenant, and take away his term, in case of waste, non-payment of rent, or improper culture of the land, his right to vacate the lease depends upon the proof of the forfeiture in a court of justice. No

lawyer ever supposed that such a clause gave the landlord the right of adjudicating finally upon the forfeiture so as to deprive the tenant of a trial by due course of law. If he attempts to enter without cause, he may be restrained by injunction. Or if he is not thus restrained, he may be sued for trespass. So here the legislature may pass the act of annulling the charter, but its validity depends upon the existence of the facts which constitute the cause of forfeitures, and these must be determined by a court and jury, according to the constitution and the law of the land. This construction of a clause of this character is sanctioned by this Court, in the Commonwealth *v.* Bonsall *et al.*, 3 Wharton, 567, where it is said that when a power to annul a charter is reserved upon terms or conditions, there can be no objection to its exercise, "provided *the case contemplated has arisen*," 3 Wharton, 567. The same principle is affirmed by the Supreme Court of the United States, 15 How., 313. Where the power to repeal is reserved unconditionally, or "whenever, in the opinion of the legislature, there has been an abuse," there can be no objection to its exercise. But in this case no such general power is reserved. The legislature did not think proper to insist on any such reservation. The judicial power over the case is therefore not given by the contract. Nor is it conferred by the constitution. It follows that the corporators have a right to a trial by jury. The stockholders are tangible individuals, with rights to protect and defend. They have a right to demand that their property shall not be taken away, "unless by the judgment of their peers," or the due course of law as administered by the constitutional tribunals, where alone the judicial power is vested.

The case originating in the territorial transactions of Iowa, when her courts of justice were in a "disorganized condition," is the only one cited which sustains the position that a reservation of power to revoke a charter in case of abuse, carries with it the additional reservation of judicial power to try and convict the accused corporation of abuse. A few years earlier, the case of Titus Losey was decided by a "Lynch Court," of the same territory. He was convicted and sentenced to pay a fine of $800. He appealed from the decision, and as the appellate tribunals of the territory were in a "disorganized condition," the Court sent up the appeal to the President of a Pennsylvania Common Pleas. He reversed the judgment and awarded restitution of the fine which had been levied. The "Lynch Court," with a proper regard for the due course of law, immediately obeyed the decision. The case is cited not because it is a better precedent than the one from the same quarter reported in Green's Reports, but merely to show the progress of judicial authority. A few years ago, the "popular" tribunals of Iowa were willing to receive the "gladsome light of jurisprudence" from the President of a subordinate Court in Pennsylvania. But now, even the irregular struggles of her infant existence furnish a precedent sufficiently potent to shift

this ancient and stable commonwealth from her constitutional moorings. "The sceptre has," indeed, "departed from Judah!"

If the preamble is to be construed as an adjudication of the Legislature, convicting the corporation of misuse or abuse, it is void for want of authority in that body to hear and determine the case, and also for want of that notice and opportunity to be heard which is indispensable to the validity of all adjudications. But in no part of the preamble does it appear that the Legislature have given their judgment that the corporation has been guilty of abuse or misuse of the privileges granted. No such words are to be found in it. On the contrary, it professes to recite a decree of this Court relative to the improper location of their road, alleges an "omission" to "complete and bring it into use" within the ten years prescribed, and then pronounces "the solemn judgment of the Legislature," not that the corporation has "misused" or "abused" its privileges, but that the charter has "become entirely null and void." It then alleges a reserved right to resume the franchise, and the first section professes to revoke and annul the charter previously stated to have already become null and void. It is manifest that the revocation is founded on the "omission" to complete the road in ten years, and not in the "abuse or misuse" of the charter. In the first mentioned contingency no power whatever is reserved to the Legislature. In the last there is a reservation. The act is therefore void because it is not founded on the section which reserves the power of repeal, but on another section relating to another contingency, in which no power whatever was reserved to the Legislature.

But as the right of repeal existed in case of abuse or misuse, a court of justice might be willing to sustain the act if the fact of abuse or misuse could be duly established now, provided the State had done nothing to waive the forfeiture. It must be remembered that forfeitures are odious, and that the law not only construes with great strictness statutes imposing them, but always lays hold of every act of waiver to relieve against them. If a lease be forfeited for non-payment of rent at the day, or omission to repair, the acceptance of rent after the day, in the first case, and giving notice to repair by a particular time, in the last case, are waivers of the forfeitures. Doe *v.* Meux *et al.*, 4 Barn. & Cress. 606; 10 Eng. C. L. Rep. 417; Doe *v.* Lewis, 6 Neville & Manning, 672; 36 Eng. C. L. Rep. 455. These waivers apply to a State as well as to an individual, 9 Wend. 379; 12 Conn. 7.

What evidence of misuse or abuse has been produced? The act of confiscation recites and relies on the decree of this court which was pronounced on the 7th September, 1854, in determining a case in equity between the commonwealth and the corporation. This is the only evidence of misuse or abuse shown or relied on to sustain the forfeiture. But the bill filed by the State demanded no forfeiture, and none was decreed. A Court of Equity never deals with the question of forfeiture, 2 Kent, 313. The application by the

commonwealth to the equity side of the court in a bill which acknowledged the legal existence of the corporation and its competency to answer, was a strong intimation that she intended to waive the forfeiture if any existed. It is not pretended that the decree contains any adjudication that the company had forfeited its charter. This Court had no power to pronounce such a decree without a trial by jury. The decree, so far from adjudging the charter void, proceeds upon the ground that the company has a legal existence and an ability to perform corporate acts. Accordingly it directs the company to break up certain portions of the railroad, and commands them to "change the route and construction of it within four months," and to "make their western terminus at what was the eastern line of the borough of Erie in 1842, or within the same borough." It also commands them "to reconstruct their railroad to supply the parts ordered to be broken up, according to plans and specifications to be by them made, and to be submitted to and approved of by this Court, on full notice to the counsel for the commonwealth, and not otherwise." If the State intended to exact the forfeiture arising from the mistake in the location of the road, the plainest principles of common honesty required her to say so before the company had expended large sums of money in reconstructing the road in obedience to this decree. The decree was pronounced in favor of the State at her own suit. It never could have been enforced except through her procurement and prosecution. Instead of suggesting on the record that she would not further prosecute the suit, but would exact the forfeiture, she appeared in Court by her counsel with her plans for the location of the parts to be reconstructed. She demanded that the western terminus should be fixed at the harbor of Erie, and that the corporation should be compelled to construct it to that point. This was asking more than was provided for in the charter, and so the Court decided. The new location in conformity to the decree was approved of. If the State intended to exact the forfeiture at all, here again was an opportunity for her to say so, in time to save the stockholders the expense of reconstructing a road under a charter which was to be taken from them. But nothing of this kind was suggested. On the contrary, the company was compelled, at the instance of the State, in a suit in her name, and prosecuted by her authority, to expend the sum of $50,000 in reconstructing their road. The State at this time had full notice of all the causes of forfeiture now relied on to justify the act of October last. She was also bound to know that her Legislature, after the existence of the alleged causes of forfeiture, had passed the act of 14 April, 1852, regulating the manner of conducting the elections of the company—fixing the extent of the rights of the stockholders in voting at such elections—continuing the old officers until others should be elected—prohibiting the corporation from changing the gauge of the road from the gauges established by the act of 11th March, 1851, declaring that the acceptance of the

act of 1852 should be deemed an acceptance of the act of 1851, and imposing a forfeiture of the charter if the company should construct or alter, or use any railroad of any other gauge of track than that prescribed by the act of 1851. The state was also fully aware of the fact that the corporation had accepted the act of 1852, thereby consenting to the burthens imposed by the act of 1851; for all this was set forth in her own bill. All these transactions were after the alleged cause of forfeiture had arisen. It was also well known to the authorities of the State (and as public acts connected with acts of the government under legislative authority, judicial notice may be taken of the facts) that the Erie and Northeast Railroad was connected at Erie with the Franklin Canal Company's Railroad; that the two roads formed links of a great chain of railroad communication extending from the Eastern to the Western States, and that the Legislature, when it annulled the charter of the latter company, were so deeply impressed with the necessity and importance of keeping up the railroad communication from the East to the West that they expressly provided in the act of 28th January, 1854, that the Governor should "keep" the latter railroad "in repair and good running order for the accommodation of the public travel and business." The "public travel and business" could only be accommodated by preserving the connection with the Erie and N. E. Railroad at Erie. Without that connection the railroad running west from Erie would be almost worthless as a means of accommodating public travel and business. Accordingly, the State herself by her authorized officers and agents, did not only keep the road last mentioned in repair and good running order, but actually kept it in operation in connection with the Erie and Northeast Railroad at the very point where the location was afterwards objected to. The commonwealth herself, while in possession of the Franklin Canal Railroad, brought her freight and passengers to that very point to be forwarded on the Erie and Northeast Railroad to the East, and received from the said railroad, at the same point of connection, the freight and passengers destined for the West. This open and notorious use of the connection with the Erie and Northeast Railroad, by the commonwealth, was continued from January until the 5th May, 1854, when the Legislature passed the act of that date "authorizing and requiring the Cleveland, Painesville, and Ashtabula Railroad to purchase the railroad now constructed from the city of Erie to the Ohio State line, and all the right and interest of the Franklin Canal Company, or any other parties in the same, with its appurtenances and the right of ways and all other rights of property connected therewith." It was also provided that the Cleveland, Painesville, and Ashtabula Railroad Company "might use and enjoy the said Franklin Canal Railroad, and its appurtenances, with a full release of any and all rights and claims of the commonwealth thereto or therein; and might construct a railroad with one or more tracks on and along it," with full power to "connect their road with any railroad or rail-

roads legally authorized to come to or to lay a road within the city of Erie." The Cleveland, Painesville, and Ashtabula Railroad was required to purchase all the stock of the Franklin Canal Company, and all the debts of the company by bond, principal and interest; and, in addition, to subscribe half a million of dollars to the Sunbury and Erie Railroad. These conditions were fully complied with, and the Franklin Canal Railroad, as "then constructed from the city of Erie to the Ohio State line," was sold by authority of the commonwealth herself to the Cleveland, Painesville, and Ashtabula Railroad Company. The State thus secured half a million of dollars towards the completion of a great work of public importance, as well as other advantages of connection and trade by this transfer. She disposed of the Franklin Canal Railroad for $500,000 more than its cost of construction, and appropriated that money according to her own pleasure. Every one in the least degree acquainted with the subject knows that it was the connection at Erie with the Erie and Northeast Railroad, and, at the Ohio State line with the Cleveland, Painesville, and Ashtabula Railroad, that gave to the Franklin Canal Railroad its chief, if not its only value. Without those connections the road was almost worthless; with them it formed a link in the great thoroughfare, from the Eastern to the Western States which was of the highest value to the purchasers and of the greatest benefit to the commerce of the several States, and to the travelling community in general. The connection at the Ohio State line had been decided to be illegal, but the object of the sale was to render it valid, and that it had that effect no one has ever doubted. If the connection at Erie was invalid the sale of the road "as then constructed" and in notorious use, ought to have the same effect. That this was the intention of both parties seems too plain to require further argument. It is not to be believed for a moment, that the State intended to entrap a corporation of a sister State into a purchase of a railroad, the sole value of which to that company was its connections with their own road and with the road east of it, and that as soon as an enormous price was secured, on that consideration alone, she intended to break up the connection and destroy the whole value of the purchase, on the ground of some mistake in locating the road, or other cause of forfeiture, well known to have existed long before the sale. The right to use and enjoy the Franklin Canal Railroad as then constructed, with its appurtenances, was transferred by the State. The transfer carried with it the right of connection with the Erie and Northeast Railroad, as then used and enjoyed, and as that right could not be enjoyed if the charter of the Erie and Northeast Railroad was declared null and void, it follows necessarily that the sale under the act of 5th May, 1854, was a waiver of the forfeiture. Either company may insist on the waiver, because where there is a legal connection of two railroads, it is a matter in which both have an interest. Where the sovereign, having power over both, authorizes one to connect with another, both are bound, one

actively the other passively. One is to do and the other to submit, and both have a right to insist on all the legal consequences of such duties imposed and powers conferred.

With this full recognition by the State of the existence of the charter of the Erie and Northeast Railroad Company, clothing it with new powers, imposing on it new duties, making use of the location now complained of herself, when in possession of the Franklin Canal Railroad, and gaining a large sum of money, in the sale of the latter road, by reason of its connection with the Erie and Northeast Railroad, at that very point, the authorities of the commonwealth could draw no other conclusion than that the Legislature intended to waive the forfeiture. That the public interest required the waiver is plain, because the interruption of the immense and incalculable amount of travel and business carried on by means of the Lake Shore Railroad could not be otherwise than a great public calamity. That the principles of natural justice demanded the waiver is equally clear from what has already been said. That the high character of the commonwealth for integrity and good faith required that she should not take advantage of the forfeiture, after such repeated acts encouraging the belief that it was waived, is also fully apparent. But it seems to be thought that the State is above the law—that she is not bound by the ordinary principles of justice—that waivers and estoppels founded on the purest equity have no effect on her rights, and that her Legislature whenever they think proper may ignore and disregard her own tribunals of justice and the rules of law and equity which govern them. The Judiciary of Pennsylvania is established by the Constitution. It administers the law according to equity and good conscience. The rules of law which govern it in the administration of justice form a part of every contract, whether with the State or with individuals. And if the Legislature is unwilling to submit to the application of those rules in the construction of their contracts, they should take care to reserve the right of exclusive jurisdiction to themselves as a part of the bargain. If they do not they are bound to submit to the high mandate of the Constitution that no man shall be "deprived of his property unless by the judgment of his peers or the law of the land," as administered by the courts of justice.

It is a great mistake to suppose that the State cannot waive a forfeiture, or that she is not bound by estoppels arising from her own acts. It has a thousand times been decided, that the sovereign, as well as an individual, may waive a forfeiture. 1 Pa. Rep. 436; 16 S. & R. 145; 5 Mass. Rep. 232; 9 Wend. 379. The doctrine has never been doubted. It was unanimously affirmed by this Court at the very last sitting for the Eastern District, in the case of the Commonwealth *vs.* The Westchester Railroad Company. The Commonwealth, like an individual, is bound by the acts of her agents, within the scope of their authority. The executive, legislative, and judicial authorities may each bind her, when acting in their appropriate spheres. The judiciary may bind her by a judgment, as often as she

voluntarily consents to become a party to a suit in court. On this ground, a judgment in a *quo warranto* is conclusive even against the king. Com. *vs.* Burrell, 7 Barr, 35. On the same principle, an acquittal in a criminal case may always be pleaded in bar to a new prosecution for the same offence. The Legislature may bind her by acts of Assembly, as often as those acts assume the substance of a contract, under which private rights are acquired. On this ground she is restrained from enacting laws impairing the obligation of contracts created by legislative enactment. The Executive may bind her, in the exercise of his official functions. On this ground a pardon by the Governor alone is an absolute bar to any prosecution by the State for the offence pardoned. The officers of the Land Office may bind her, in the exercise of their duties. By a warrant, survey, and patent for land, she is precluded from selling the same land a second time. Her Attorney General may bind her by coming into Court with her suits, and thus bringing her within its jurisdiction and subject to its judgment. It follows, from these principles, that when the Commonwealth voluntarily came into the equity side of the Court with her bill, she bound herself to submit to the decree. If the bill was ambiguous, there was no ambiguity in her subsequent application. When she demanded a decree to compel the re-construction of the road to the harbor of Erie, and obtained one ordering its reconstruction to Twelfth Street, a judgment was pronounced which was utterly repugnant to any claim of forfeiture previously known to exist. That the alleged cause of forfeiture was known to exist when the bill was filed fully appears from the bill itself.

It is manifest therefore that the decree relied upon as establishing the right of the Legislature to annul the charter confers no such authority. On the contrary, when considered in connection with all the acts which preceded and followed it, that decree is a perfect estoppel against any such enactment. It is a solemn adjudication awarding compensation for the alleged cause of forfeiture, instead of exacting the forfeiture itself. The State had the right of election to demand either, but could not enforce both. She elected to receive compensation, and has thereby precluded herself from exacting the forfeiture. To insist on both is repugnant alike to the rules of law and common honesty. If the condition of a bond be performed after the day, and the obligee accept it, the penalty cannot afterwards be exacted. If the money due on a mortgage be accepted after the day of payment prescribed, and after the estate if the mortgagor is forfeited at law, the forfeiture is waived, and the estate is saved. We have already seen that where the estate of a tenant is forfeited for omitting to repair, if the landlord, instead of exacting the forfeiture, gives the tenant notice to repair within a particular time, the forfeiture is waived; and the reason is that were it not so the landlord might wait until the tenant had made the repairs, and then deprive him of his repairs as well as of the estate. 10 Eng. Com. Law Rep. 417; 36 ib. 455. It is true that where a turnpike company has for-

feited its charter by permitting its road to remain out of repair and impassable for the period prescribed as constituting a forfeiture, the subsequent repair of the road at its own motion, and for its own profit, will not atone for the past offence. People *vs.* Turnpike Co., 23 Wend. 258. But what has that to do with a demand by the Commonwealth for specific restitution for an injury caused by an error in the location? What has that to do with a case like the present, where the State made use of the compulsory power of her own judiciary to compel the expenditure of $50,000, to repair the error complained of, and afterwards attempts to seize the charter and the improvements thus made, under an allegation that the expenditures were not made within the ten years prescribed? If that was ground of forfeiture the corporation had no right to expend the money at all. If the powers of the corporation had expired it had no right to take private property for the new location, or to do any other corporate act. But the decree recognized its corporate capacity to act, and the Commonwealth, in procuring it, necessarily waived the forfeiture. I cannot assent to the doctrine that the State may demand compensation for a forfeiture, and afterwards exact the forfeiture itself! Such a doctrine is monstrous! It has no parallel even in the unmitigated exactions of circumcised extortion. The principles of Shylock himself were quite elevated in comparison with it. He adhered religiously to the penalty of his bond, and had too much respect for law and common sense to accept of compensation so long as it was his purpose to exact the "pound of flesh."

We have already endeavored to show that the failure to complete the road within ten years was not an "abuse" or "misuse," within the meaning of the clause reserving the power to annul the charter. The inability to complete an expensive work of that kind within a particular time, is neither an abuse nor a misuse in any sense. It may be an unavoidable misfortune. It is especially no misuse or abuse within the meaning of the charter in question, because that instrument has expressly made other provision for that contingency in a separate section, in which no legislative power of abrogation is reserved. The clause relating to the failure to complete the road within ten years composes the 10th section of the act. The reservation of the power to annul the charter for abuse or misuse is to be found in the 11th section. The two sections have no connection with each other. They relate to different conditions. The 11th section applies exclusively to *positive* acts. The 10th section to mere *omissions*. There can be no *abuse* or *misuse* without a positive act of malfeasance. This, to furnish ground of forfeiture, must be *wilful*. It must be something more than *accidental negligence, excess of power, or mistake in the mode of exercising an acknowledged* power. 23 Wendell, 193; Angel and Ames on Corporations, 745. But a failure to complete an expensive work within a particular time may arise from inability, misfortune, mistake, and many other causes entirely destitute of any wilful intention to disregard the condition.

The forfeitures arising from the causes first mentioned were those provided for by the reservation of power. But the forfeiture arising from the cause last named is not within the reservation at all. So that as already stated, the action of the legislature, on the face of the act itself, evidently exceeds the power reserved. It is founded on a mere omission, and not on any act of misuse or abuse of the charter.

The section relating to the completion of the work provides that if the Company do not complete the work, *so as to bring it into use within ten years* after the passage of this Act, "then this charter shall become null and void." It is a well-established rule of law that statutes imposing forfeitures are strictly construed. If the Commonwealth had demanded the forfeiture by proceeding at law, a very different question would have been presented from that which was adjudicated by the Court when sitting in equity; and the course of trial would have been entirely different. The facts would have been ascertained by a jury according to the due course of the common law prescribed by the Constitution. What were the facts? The work was completed "so as to bring it into use within ten years after *the passage of the act*" of incorporation. This is not denied. The work was done within the time prescribed. The road was in full operation within the time. The travelling and business community were in the full enjoyment, within the ten years, of all the advantages contemplated by the charter. Every substantial object contemplated by the 10th section had been fully attained. But it is contended that the charter required the road to be constructed to the borough of Erie. True, the Legislature had made a municipal Corporation the western terminus of the road; but the same authority afterwards, and before the road was finished, enlarged the area of that municipal Corporation, and converted it from a borough into a city. And the Railroad Company, with the assent of the municipal powers established by the Legislature, fixed the terminus within the limits of the city, without carrying it to the obliterated borders of the extinguished borough. This was done under resolutions of the City Councils expressly consenting to it, but reserving the right to "withdraw that privilege, provided the use and occupancy thereof shall appear to them to be injurious to the interests and welfare of the city." It is not necessary to discuss the extent of authority existing in the municipal Corporation. It is sufficient to say that it was clothed with a portion of the governmental power, and that it was the creature of the State, and, to the extent of its authority, it was the agent of the State. It assumed to act in the matter. Its action was well known to the State authorities. It was her duty, if she intended to exact the forfeiture, to disavow the authority the moment it came to her knowledge. But no such disavowal took place until the work was completed and the ten years had expired. Under these circumstances it seems clear that no Court of justice in the civilized world, proceeding with the aid of a jury to determine the

facts, would have decided that "the work was not completed so as to bring it into use within ten years; and that the charter had thereby become null and void. On the contrary, the rule would have been laid down, as it always is in such cases, that "a substantial performance of the conditions is all that is required, whether they be conditions precedent or subsequent." 21 Wend. 235; 23 Wend. 537. And it would undoubtedly have been held that the completion of the road to a point within the new municipal Corporation, which had been substituted for the old one, so as to furnish the required facilities for commerce and travel within the time prescribed, was a substantial compliance with the conditions of the grant. But a very different rule might be applied when the State merely sought the equitable intervention of the Court to compel a change of location at the western terminus, in accordance with the arrangement made with the authorities of the city. These remarks apply also, in general, to the location of the road at Harbor Creek, which was directed to be changed on account of its interference with the Buffalo Road. An error in the location, or even a nuisance in a common highway occasioned by an erroneous location, or an unskilful plan, or execution of the work, is surely not a failure to complete it, in any just sense of the term, so as to authorize a judgment of forfeiture for that cause.

But the act of 1855 bears upon its face decisive evidence, that other objects were in contemplation than the mere nullification of the charter. It provides for taking possession of the railroad, keeping it in good running order for the accommodation of the public travel and business, collecting the revenues and disposing of them as the legislature may hereafter declare, subject to any rights or obligations which may exist. It also provides for restoring the possession of the road to the company, if they shall break up the connection at present existing with the western road, extend their road to the Harbor of Erie and terminate it at that point, and change the gauge throughout the whole length of it, either to four feet eight and a half inches, or six feet, and maintain the same thereat. These are burthens which the charter did not authorize the legislature to impose. That the termination at the Harbor would greatly increase the expenditures of the corporators, and materially impair the usefulness of the road for the purpose for which it was designed is perfectly manifest. That this is the principal object of the act is too evident to escape observation; and that it is imposing a ruinous burthen, not warranted by a single word in the charter, is equally clear.

If the corporation refuses to comply with the conditions proposed by the act, what is to become of the Railroad? It must be remembered that the State is acting under a *reservation*, not a *grant* of power. It is the very essence of a reservation that it can operate only upon the powers existing before in the party making it. It has no effect whatever upon rights which previously existed in the opposite party, or were afterwards acquired by his labor and money ex-

pended on the faith of the grant. The powers existing in the State before the charter were merely the privileges granted by it. These were all that she granted, and these only can she take away under a reservation. The language of the reservation plainly confines its operation to these only. The State granted neither land, nor money, nor goods, and she can take none of these from the stockholders. The reserved power to annul the charter carries with it therefore no power whatever to seize the railroad, or to divest the stockholders or the owners of the land, of their rights and property. At common law, upon the civil death of a corporation, all its real estate remaining unsold reverts to the grantor and his heirs; for the reversion in such case is a condition annexed by law, inasmuch as the cause of the grant has failed. 1 Bl. Com. 484; 2 Kent's Com. 307; Angel & Ames on Corporations, 750, 159; Co. Lit. 13, b; 15 Howard's Rep. 310. It might be that a Court of Chancery, in a proper case, would appropriate it to the debts of the corporation. But this is not the question here. It has been held that where a title to land is vested in a turnpike company for the purpose of a road, and the road is abandoned, the land reverts to the original owner; 12 Wend. 371. And writers of approved authority inform us that the grant to a corporation is indeed only during the life of the corporation, and that when its life is determined by the dissolution of the body politic, the grantor takes it back by reversion, *as in case of any other grant for life.* 1 Bl. Com. 484; Angel & Ames, 159. If the charter in question is legally declared null and void, the railroad reverts to the former owners of the land on which it is constructed. The title by reversion is as sacred as a title in possession or remainder, and the owners cannot be deprived of it except by due course of law. So that the only effect of this act of abrogation will be to destroy the railroad altogether, or to throw it into the hands of the individual landholders along the route, without any security that it will be kept in running order for the public accommodation. Under the power to take lands for ordinary roads, the legislature might take the land on giving compensation for the improvements. But in this case no provision for compensation has been made, and that already received was only for the easement during the life of the corporation. So that by no rule of law, nor any fair construction of the clause of reservation, can the State take possession of the railroad in the manner and for the purposes proposed by the act, even if her right to annul the charter were fully conceded. It is idle to call the railroad a *common* highway, in order to justify this extraordinary act of confiscation. The State has not made it so, nor can she make it so, unless she takes the land for the purpose upon just compensation to the owners. It is of the utmost importance that the law on this branch of the case should be insisted on. If a State, under a reservation of power to revoke a charter may also seize and confiscate all the acquisitions of the stockholders, a constant temptation will be presented to exercise the power without

cause. A judgment should be impartially pronounced. But if the State, or local authorities of great influence, are to gain by confiscating the assets of a wealthy corporation, who can hope for an impartial decision, or what corporation in the commonwealth is safe?

It would be unjust to the members of the legislature who voted for the act of 5th of October, 1855, to suppose that they would have sanctioned any such a violation of contract as that act proposes, if the decree of this Court had been fully recited in the preamble, and the facts which preceded and followed that decree had been fully made known. It would be equally unjust to the governor, who refused to sign the bill for many months after it had passed the two houses, to believe that he intended anything more than to present the question to the proper judicial authority for decision. Indeed the readiness with which that officer yielded to the intimation of this Court in suspending the execution of the act until its validity was passed upon by the judiciary, is evidence that he entertained doubts on the question. The enterprising population of Erie, if they had no interest in the question, and had not been excited by the long conflict in which they have been engaged, would scarcely sanction this proceeding. It is but just to look at the circumstances under which they have resorted to this measure. They consider themselves in a state of war with these corporations. They have battled bravely, and at much sacrifice of time and money for the advancement of their local interests, and now, when they think they have their enemy conquered, they may feel justified in claiming by right of conquest the privilege of dividing the spoils.

In conclusion, I am of opinion—

1. That the charter of the Erie and Northeast Railroad Company is a contract.

2. That the legislature have no right to revoke it unless the power be reserved in the grant.

3. That the reservation of power to annul the charter by the legislature is upon the condition of misuse or abuse; and the legislature possesses no judicial power under the constitution, and have reserved none in the grant, and are therefore not authorized to adjudicate upon the abuse or misuse.

4. That the validity of the act of 5th October, 1855, depends upon the existence of the abuse or misuse, and the right of the commonwealth to take advantage of the forfeiture at the time the act was passed.

5. That the law existing at the time of the contract formed an essential part of it, and creates the very obligation which the constitution declares shall not be impaired. The stockholders have, therefore, by the contract, a constitutional right to a regular trial by jury.

6. That there has been no misuse or abuse within the meaning of the reservation.

7. That the road was substantially completed and brought into use within ten years, so as to save any forfeiture on that ground.

8. That the error in the location of the railroad was neither an abuse, misuse, nor failure to complete it within the meaning of the 10th and 11th sections of the act of incorporation.

9. That if any forfeiture had accrued, the State has waived it, and estopped herself from taking advantage of it, by compelling compensation for it under a judicial decree of this Court.

10. That if the act of the 5th October, 1855, was valid in annulling the charter, the legislature have no power under the reservation to take possession of the railroad.

11. That the act of 5th October, 1855, impairs the obligation of the contract with the stockholders of the corporation, and is therefore a violation of the Constitution of the United States. It is also for the same reason a violation of the Constitution of Pennsylvania.

12. That it is an exercise of judicial power vested by the Constitution in the Courts of justice and not in the legislature, and is therefore void.

13. That it deprives the parties of the trial by jury contrary to the Constitution, and is therefore void.

14. That it takes the property of the stockholders without the judgment of their peers, and contrary to the law of the land established by the Constitution, and is therefore void.

I am in favor of granting an injunction to prevent the seizure of the railroad, until the rights of the parties be determined by due course of law.

THE ERIE AND NORTHEAST R. R. CO.
vs.
JOSEPH CASEY.

Judge WOODWARD, dissentient.

Concurring in several of the propositions better stated in the opinion of the majority than I could express them, I am relieved from the necessity of discussing them, and will content myself with indicating which they are, and then assign, as briefly as possible, my reasons for dissenting from the general conclusion to which the majority have arrived.

That the judiciary may in a clear case declare an Act of Assembly unconstitutional, that he who seeks to impeach it is bound to show what part of the constitution it violates—that no statute is unconstitutional merely because it is against public policy or inconsistent with rules of law or principles of equity—that an Act of Assembly granting corporate rights which are accepted is a contract and inviolable, that if it contain a clause of repealability that is part of the contract, and a law passed in pursuance thereof is not a law impairing its obligations, and that corporations with such a clause in their charter may be repealed without resort to legal process in a court of justice,

are propositions of a general nature to which I assent. A corollary from these principles is that where the right of repeal is reserved, the repealing law must be in accordance with the terms of the reserved right.

Now, to make an immediate application of these principles to the case before us—the Act of 12 April, 1842, was a contract between the Commonwealth of Pennsylvania and the above named Company wherein the parties agreed that "if the said Company abuse or misuse any of the privileges hereby granted, the Legislature may resume the rights hereby granted to said Company." Had there been no such clause in that Act, the State would still have had the right by *quo warranto, or scire facias* in a court of law to enforce a forfeiture of the charter for the same causes, misuse or abuse; for such is the tacit condition which the law annexes to all charters, but being expressed in this one, she may do it by her legislative instead of her judicial agents. This I conceive is the whole effect of the clause.

In the one case the power is judicial because such is the implied contract—in the other it is legislative because so is the express contract, but in both it derives its right to act from the contract, and can only act according to the terms and conditions of the contract. When, therefore, the contract stipulates a condition of fact on which alone one of the parties may rescind it, that fact must be ascertained and established before the power of recision can be exercised by either the legislative or judicial organs of the government. The power is tied to the fact, and without the fact there is no power.

The condition of fact here is misuse or abuse. Had the Legislature ascertained and established *that*, I agree they might have repealed. And I will not say that they should have sent the fact to be enquired of by a court and jury; though this would doubtless have been the most prudent course. They might have ascertained it for themselves through committees of investigation which are common in legislation. But until the fact was established, the Legislature had no more power to repeal this charter than they had to destroy any other contract in the commonwealth. They made no inquiry into the fact. Their preamble proves this, and a preamble though strictly no part of the statute may be resorted to for discovering the grounds and inducements of the law. Lord Coke considered the preamble a key to open the understanding of the statute.

What says this preamble? It recites no inquiry or investigation on the part of the Legislature, but that certain facts had been "judicially determined" by this Court, and thereupon the Legislature enters its "solemn judgment" of forfeiture. When it is considered that this Court is not the constitutional trier of any fact, and that the constitution gives the Legislature no judicial powers, it is a singular reversal and confusion of settled ideas—this solemn judgment of the Legislature on facts judicially ascertained in a proceeding on the equity side of the Court.

So far as legislative investigation might ascertain the fact of misuse and abuse there was no ascertainment nor attempt to ascertain it. Did it exist? Had there been misuse or abuse? The Legislature says it had been judicially ascertained, but unfortunately the record referred to shows that misuse and abuse of charter privileges were not charged, were not tried, and were not found. Unlawful interference with certain roads and streets, and adopting the city of Erie for the borough of Erie as the western terminus of their road, were the complaints against the Company in that record, and upon facts that were admitted, the judgment of this Court, sitting as a Court of Equity, was that the complaints were well founded and should be redressed. And the record shows that they were redressed—the Company at the suit of the commonwealth was made to alter its road in the particulars specified, so as to conform to the literal and most exact interpretation of the charter. The bill before us now alleges compliance with that decree at a cost of about $50,000, and there is no denial of it on the part of the defendant. When the Legislature then recited these judicial proceedings and entered its solemn judgment of forfeiture, this Company had a road on the very ground specified in their charter, and had complied, so far as it is now shown us, with every part and parcel of their contract with the commonwealth. There was then no misuse or abuse. The contingency did not exist in which the reserved right of repeal was to be exercised.

But it had existed, say the majority, and the State might recur to the former breach although cured now, and repeal because of that.

I dissent totally from this position, and from all that is said in the majority opinion in support of it.

1st. Because I am not satisfied that the violations of charter which were established in that judicial proceeding amounted to *misuse* or *abuse* of charter privileges. These words are not very well defined in the law; but if we can fix their legal meaning, we are to presume that the parties to this contract used them in that sense. Franchises, says Baron Comyn, may be forfeited by breach of the *trust* on which they were granted and *perversion of the end of the grant:* And again, franchises may be forfeited by *misuser* or *abuser*, or other *misdemeanor*, in him to whom they were granted. Digest, title Franchise, pl. G. 3. I am of opinion, said Lord Holt, in Rex *v.* Mayor of London, 1 Shower's R. 280, that a corporation may be forfeited if the *trust be broken and the end of the institution be perverted.* And Lord Coke, in the Earl of Shrewsbury's case, 9 Coke's R. 50, explains the term misuser by the example of a judge taking a bribe. Now from all this we are to understand these words as importing something more than involuntary misconduct or mere technical wrongs—something that implies a high degree of turpitude—a wilful malfeasance, a species of misdemeanor. A deliberate perversion of charter powers to an object not contemplated in the grant, such as occurred in the instance of the Franklin Canal Company 9 H. 117, is a breach of trust and misuse and abuse.

But if the facts which attended the construction of the Erie and Northeast Railroad ever come to be investigated with a view to forfeiture, it is exceedingly doubtful whether they will be found to be misuse or abuse. The oldest and most experienced member of this bench did not consider them even substantial violations of charter duties: And it is possible to conceive that the company considered themselves bound to interfere with streets and roads to the extent they did, in order to accomplish the main purpose of their institution in a manner most beneficial to the public; and that, as the City of Erie included the borough, they touched the one when they came to the other. I say merely that these were *possible* views, which a company intent on doing its whole duty might take, without intending any breach of trust, or deliberate perversion of their powers.

On the questions then presented, however, and for the purposes of that proceeding, I did not hesitate to give my voice for compelling them to a strict performance of their undertaking. With the majority I held *any* interference with the Buffalo road to be wrong, and read the word borough strictly, not because any grievous infraction of the charter had occurred, nor because the public interests were to be subserved by the change of location which we compelled, but because in construing charter powers, I knew of no better guide than charter words, and was, as I always am, quite willing to enforce corporate deference to legislative authority when constitutionally exercised. But I did not understand, and I think none of us did, that we were passing on the meaning of the words misuse and abuse as grounds of forfeiture. Sitting as we then were as a court of equity, we had no jurisdiction of a question of forfeiture, and none was raised or decided. The promoters of that suit insisted we should send the company to the harbor, but as that word was not in the law, we could no more decide that they were bound to terminate at the harbor than at the court-house. We asserted the sound principle that we would, when called on for the purpose, compel corporations to walk in the precise path prescribed, but we did not decree a forfeiture or decide that cause of forfeiture had occurred. The Legislature therefore misconceived the purport and effect of the record to which they appealed. It did not establish misuse and abuse, and I repeat that I am not satisfied that the facts it did establish amounted to misuse and abuse.

2. A second ground of dissent is, that it appears from all that has been said that the company never had a chance to contest the facts of misuse and abuse. I never have as a judge condemned anybody unheard, and I never will. There is not probably a corporation in Pennsylvania, which has not omitted some duty, or done something it should have left undone. Annual reports to the Auditor General are required by law, but they are often delayed and sometimes omitted. Doubtless on an injunction we would compel a corporation to perform the duty, but would that record prove misuse and abuse for purposes of forfeiture? The Central Railroad Company have no

right to commit nuisances in the streets, which they do frequently, perhaps daily. If a conductor were indicted and punished, or a verdict in damages recovered against the company, would the record prove misuse and abuse as grounds of forfeiture? Not until all rules of reason and justice are forgotten, and why?

Without other reasons this one would be sufficient, that the company had not been tried for a forfeiture; had not been called on to answer for misuse or abuse. Summon a party and try him for one thing, and then punish him for another—was that ever heard of before? And when he claims the right of the meanest felon, to be heard before he is condemned and executed, is he to be told that a record made up for another purpose established his guilt? Such doctrines confound all my ideas of the course of justice. The law of the land is, that a cause of forfeiture cannot be taken advantage of or enforced against a corporation collaterally, or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation, so that it may have an opportunity to answer. Angell & Ames on Corporation, 664, and the cases cited in the note. But here is a corporation holding its existence on the faith of a contract with Pennsylvania, condemned to capital punishment without arraignment, trial, or proof of guilt. We treat traitors and felons better than this.

I maintain that somewhere, and in some way, this corporation should have been permitted to answer to the charges of misuse and abuse—and that, not only for the sake of decency and justice, but also because they held the right by contract. When they staked their existence on a *fact*, and the State pledged her faith on the same *fact*, it must be inquired into, found, and fixed with full opportunity to controvert it, before that existence can be imperilled. The State has many organs, of whom the Legislature is one, but she has no agent authorized to disregard or violate her plighted faith. It would be strange if the rule of good faith and the constitutional inhibition bound all the other organs of the State, and left the Legislature free. It is not so. The State herself in her aggregate capacity is bound—"*no State* shall pass a law impairing the obligation of contracts"—and of course all her agents are bound.

When I concede that the Legislature might have inquired into the facts of misuse and abuse, I do not mean to recommend legislative investigations as the best mode of establishing facts. They are not worthy of as much confidence as the verdict of a jury under the direction of a court of law, but still, where they are entrusted to a competent committee, and conducted in the forms of legal proceedings by examination of witnesses in the presence of the accused party, and with the right fully secured to him of cross-examining, and being heard by counsel, they are not unfit to be the basis of legislation. In cases of contested membership, and of impeachment the Legislature are made, by the constitution, triers of fact, and in practice they become such in many other cases. When a charter

therefore expressly reserves to this department the right of resumption on a condition of fact, they may try and find the fact—or send it to a court and jury to be found—but to say that they can resume without that fact found, is to contradict the constitution, and to say they may violate the contract with impunity.

3d. A third ground of dissent is this; if the mistakes or misdeeds of this corporation did indeed amount to cause of forfeiture, the State waived it, and then it was as if it had never existed.

The principle of the common law is not controverted that if an estate be held of another on a condition to be performed by the grantee, the grantor may enter for condition broken, but if he accept compensation, and particularly if he compel performance of the condition, his right to enter and forfeit the estate is gone, because, in the language of Lord Coke, he *affirmeth the estate and waiveth the condition*, 2 Coke Litt. 83. And that this principle is applicable to a Commonwealth in respect to corporate grants, is abundantly shown by the authorities. Said Chief Justice Parsons, in 5 Massa. 232, the commonwealth may waive any breaches of any condition express or implied on which the corporation was created; and the same thing was said or assumed by this court in 16 S. & R. 145. 1 Penna. R. 426. 7 Barr. 34. 8 H. 417. It is on this ground that we do not allow a private citizen to sue out a *quo warranto* to forfeit charters —the Commonwealth may have waived the breach, and therefore she only shall sue.

The State, then, may waive a cause of forfeiture, and the matters alleged in the plaintiff's bill persuade me that she intended a waiver in this instance. If not, why was the Act of 14 April, 1852, passed, recognizing the continued existence of the company and regulating it? And why was injunction in a court of equity sued out to compel strict performance of duties, instead of a *quo warranto* in a Court of law to resume the franchise? The State is an intelligent body, capable of choice—and when a deliberate election of one remedy instead of another has been made, we must make the rational and necessary presumptions. It seems to me she meant chastisement and not destruction, and if she did, then all prior causes of forfeiture were gone. The State is bound by the same rules of honesty and morality as her citizens, and if one of them having compelled a refractory tenant to perform his covenants, could not enter and dispossess him after he had done so, neither can the State.

But it is said this is common law which the Legislature is competent to repeal. Whilst the general power of altering the common law is fully conceded, I deny that the Legislature can alter it *after it has entered into a contract of the State.* The contract set up here involved these common law principles, which are nothing else than the principles of common honesty, and the constitutional provisions which give inviolability to contracts were also part of this particular contract. The State bound herself by this contract not to use her power of repeal except for misuse or abuse. If misuse or abuse ever

existed it was waived and forgiven. When the repealing law was passed, therefore, the State had not the power of repeal—it was restrained, held in check, and held *hard* by her contract. The error of the majority is, that they begin by conceding the contract, and then reason as if there was no contract in the case but only laws. If there is any truth in logic such reasoning is outside of the premises.

Another position founded, it seems to me, in the *petitio principii*, is this: every Act of Assembly is presumed to be constitutional till the contrary is proved. The constitutionality of the Act of '55 depends on the existence of a certain fact. That, therefore, must be presumed, and then it is concluded, that he who would prove the act unconstitutional must disprove the fact. In other words, an Act, confessedly impairing the obligation of a contract, is to be presumed constitutional until a negative is proved.

Now, to this I reply, that the constitutionality of the Act being the very point for demonstration, it is not to be assumed. Primarily, I agree, one department of the government will, from courtesy, presume the action of every other department to be within its proper sphere; but when it is shown that a particular Act of the Legislature on its face transcends the constitutional limits, no presumptions are to be set up in favor of such an act and against him whose contract is impaired. On the contrary, the presumption which arises on such an Act, is *against* its constitutionality, and if facts exist to justify it, they must be proved by him who pleads the Act. It is admitted on all hands that the Act of '42 was a contract, and that the Act of '55 impaired it. At this point, then, I insist the necessary presumption is that the Act of '55 is unconstitutional. But, says the defendant, the Legislature reserved the right to impair it on the happening of a certain event. Granted, say the plaintiffs, but that event has not happened, and if you allege that it has, you must prove it. No, says the defendant, without either alleging or proving it, it must be presumed to have happened, because the law must be presumed constitutional, and nothing can rebut this presumption but your proving that it has not happened.

On this method any legislation that is imaginable might be sustained, and it would follow that, notwithstanding our written constitutions, full of checks on legislative power, we have got a parliament so omnipotent that they may dispense with trial by jury, and make and unmake facts as well as laws at their pleasure. Attainders for treason and confiscation of estates, might thus become fashionable Pennsylvania legislation.

I cannot yield my understanding to such reasoning or conclusions. I read in the books that the law leans against forfeitures, that the party claiming a forfeiture or penalty, is bound to make out his case precisely, and that if it involves a negative he must prove it; 2 Gallison's R. 498—that a law, confessedly impairing the obligation of a contract, must have a clear warrant in the contract itself—that a

sovereign State when it condescends to contract with a citizen, is bound to the same measure of fidelity which binds him, and that the obligation is all the more sacred because no legal remedy is afforded for its breach, and on such principles I conclude that a forfeiture waived cannot be reclaimed, and that a contract not violated, cannot be repealed.

The preamble also recites, that it had been "judicially determined" that the road was not completed in ten years. Many of the observations made on the other point are applicable to this. Without intending the least disrespect to the legislature of 1855, it must be said, that here again they misconceived the recited record. It did not establish that fact within the meaning and for the purposes of the 10th section of the incorporating law. That section provided that the charter should be null, not that it should be resumed, "if the company do not complete the work so as to bring it into use within ten years," and the bill for the injunction charged, that it was not so completed; but it did not ask that the character should be declared null on this account, and it was not so decreed—nor was the fact ascertained, that the "*work*" was not completed so as to "*be brought into use.*" What the fair import of these words was, and whether they had not been complied with far enough to save the charter, were not subjects of investigation or decision in that record, and therefore it is inaccurately cited in the preamble. Had the legislature referred themselves to the bill which was the foundation of that record, they would have seen, that after charging a variety of matters, the failure to complete among the rest, the commonwealth complained, that "all of which doings, actings, and pretences of said Erie and Northeast Railroad Company are contrary to *equity and good conscience*, and concluded by praying, that they be enjoined from using and occupying certain public roads and streets. And so was the decree. It compelled the company to do equity, but it did not declare their charter *null*, any more than it declared it forfeited for misuse or abuse. It was no less a mistake, therefore, for the legislature to surmise this a defunct corporation, that it was to consider it convicted of a capital offence.

And before it can be treated as a defunct corporation, it must be shown, upon an inquiry into that fact, that it did not build as required by the 10th section. When the Commonwealth undertakes to show that, she will be met by this same record to which the legislature appeals, and that will prove that she sued the company as a live corporation after the ten years had expired, and compelled them to put their road in the right place.

There is no ground in this part of the preamble for such an enactment as followed it.

Enough has been said to indicate my deeply-seated conviction, that the act of 1855, as impairing the obligation of a contract, is in conflict with the 10th section of the 1st article of the Constitution

of the United States, and the 17th section of the 9th article of the Constitution of Pennsylvania.

I am obliged to say further, that I consider this Act of Assembly in direct conflict with that clause of the 10th section of the 9th article of the Constitution of Pennsylvania, which is in these words: "Nor shall any man's property be taken and applied to public use without the consent of his representatives, and without just compensation being made."

The stockholders of the Erie and Northeast Railroad Company are *men* within this clause—the franchise they hold (which is the right to maintain and enjoy their railroad), and the interest they have in the ground occupied by it, and in the material substances of which it is composed, are *property;* and that it is to be taken and applied to public use under the act of 1855, is proved by the 2d section, which authorizes the governor to appoint a suitable person to take charge and custody of the road, "until the same shall be further disposed of according to law;" and by the declaration of the defendant, that he will, as the appointee of the governor, take possession of the road, unless restrained by the injunction of this Court. If it be assumed that the law was passed with the consent of the representatives of these *men*, the only remaining question is, does it provide a "just compensation?" There is not a word or syllable in the act looking to compensation. The 5th section authorizes the governor to restore it to the company on certain conditions to be performed by them, which, instead of being compensation, are burthens laid upon the company as the price or consideration of a renewed existence. How then can I, who am sworn to support the constitution, support a law which is in such direct and palpable conflict with it? The constitution says, that property shall not be taken without compensation—this law says it shall.

Let us examine the argument set up in favor of the law on this point.

Again the resort is to the repealing clause, and that is made to bear the burthen of this palpable infraction of the constitution. Does it say that the franchise may be resumed without compensation? Not a word of it. Does the constitution say that property shall not be taken for public use, except in the instance of a corporation with a clause of resumption in its charter? Not a word of it. And yet judicial construction can so bend both the law and the constitution as to make them meet.

That the State, in virtue of her eminent domain, can take all kinds of property when public exigencies require it, is a doctrine I hold most distinctly. Every man holds everything which can be included in that most comprehensive word, "property," by no higher tenure than the will of the sovereign; but "just compensation" is the correlative duty of the sovereign. A franchise, like any other hereditament, incorporeal or corporeal, may be taken on this single condition, but nothing that is property can be taken in violation of

it. Whether a mere franchise, where nothing has been done or invested on the faith of it, is property within the meaning of the constitution, is a question which need not now be considered, for it is not presented in the case that is before us. This is the case of a private corporation, with large investments actually made. Here the franchise, or the "rights and privileges" in legislative language, have been accepted—property, real and personal, accumulated on the faith of them—a railroad built in a most important line of trade and travel, and furnished with all appliances for the accommodation of the public, and a distinction can no longer be made between the franchise and the material, and tangible property with which it is identified. The legislature attempted no distinction, for in resuming the franchise, they provided also for taking the visible property, and I agree that they were so indissolubly united that to take one was to take both.

But to take both without a word or thought of compensation was justified by nothing that is set down in the contract, and was forbidden by as plain words in the constitution as the English language could place there.

Upon the dissolution of a corporation by *judicial* sentence, its real estate reverts to the grantors or their heirs, and its personal property goes to the State, as the successor to this prerogative of the crown, but no such incidents attend a *legislative* forfeiture. That must be in all its parts according to the contract which gives the legislature the power, and when the contract does not stipulate that property held on the faith of it may be taken without compensation, it cannot be so taken if the constitution means what it says. If, therefore, there had been no waiver in this instance, and if the legislature had established misuse and abuse, and in virtue of the reserved power had resumed the rights and privileges granted, they were bound to provide a just compensation for the property taken. Confiscation of that was not in the contract, and therefore not within the legislative power.

Hitherto, property in all its forms has been regarded as one of the "general, great, and essential principles of liberty" in Pennsylvania. When the government has required more of the citizen than his share of general burthens imposed through the taxing power, he has been compensated for what has been taken. And looking to the immense investments already made on the faith of our constitutional guaranties, and yet to be made before the high destinies of the State are fully reached, it is obvious that our settled policy is not more agreeable to our fundamental law than it is to the honor and interests of the State. This act of Assembly is a wide departure from our established policy and practice—evidently passed in ignorance or forgetfulness of the salutary injunction of Chancellor Kent, that "*these legislative reservations of a right of repeal ought to be under the guidance of extreme moderation and discretion.*" 2 Com. 307. The best

wish that such an act is capable of exciting is, that it has no precedent, and may never itself become one.

There is an observation in the printed argument of the counsel for the plaintiffs, which, on reflection, has made a sensible impression on my mind. It is, that the Act of 1855 is not a *bona fide* exercise of the reserved right of repeal. If this be a fair comment, it answers the whole argument in support of the law, for that rests on the reservation and nothing else. Taking the ten sections of the repealing law together, there is ground to doubt whether the legislature did not use this reservation as the means of forcing new and onerous burthens upon the company—whether they did not mean, that instead of dying and being buried, it should survive and perform the arduous and expensive work of building a road to the harbor and of changing their gauge throughout.

I do not intend to discuss this view of the act, but allude to it for the purpose of saying, that it would be, if so understood, no less a violation of the contract than in the other views that have been presented.

I am now done with this act of assembly. Contemplated in any light in which I have been able to view it, it seems to me an unconstitutional enactment. It places Pennsylvania in the perilous position of a sovereign punishing for unascertained offences—reclaiming forfeitures once released for a consideration—and taking from the citizen his property without compensation or trial.

It only remains for me to condense my thoughts into two propositions.

1st. The act is unconstitutional, because it impairs the obligation of a contract, and is warranted by nothing contained in the contract.

2d. Because it takes private property for public use without just compensation.

On these grounds I would award the injunction.

ERIE AND NORTHEAST R. R. Co.
vs.
CASEY.

Opinion of LOWRIE, J.

Concurring with my brother Black in the results which he has expressed, I desire only to add a few words, in order to present some of the questions in the form which they have taken in my own mind.

It is provided in this charter that the legislature may resume the rights and privileges thereby granted to this Company. The charter is nothing else than the act and instrument by which rights and privileges are granted, and the resumption of the rights and privileges carries with it the revocation of the charter.

The power that may produce this result is the legislature, and therefore the power that granted is reserved for revocation. This

reservation of legislative power over a subject is perfectly legitimate, and is not chargeable with the vice of enlarging the political functions of the legislature by means of a private contract. Before the charter the legislature had full power over that subject, and in the charter they expressly retain it, so that no doubt is left that the charter is still subject to a legitimately legislative control. And such control is expressly sanctioned as legislative by the constitution, article 1, s. 25, in an analogous case.

In saying that this reservation is of legislative power, we distinguish it from the power of forfeiture by due course of law; for that is a judicial power, exercised for punishment, and needing no reservation in the charter, and no contract, to support it; the power of punishment being involved in the very nature of government, and not at all needing the aid of a contract relation. We distinguish it further from the power of setting aside contracts for the bad faith of one of the parties; for that too is a judicial power, and needs no such express reservation. We distinguish it finally from the power which a party has to rescind a contract for condition broken; for that is not legislative power at all, but the power of executing an existing law, to wit, the contract law of the given relation.

Admit now that, as a general rule, corporation charters are protected, as contracts, from legislative interference; this charter does not fall within that category, for the legislative power to interfere is reserved in the grant of the franchise, and therefore no such contract was intended. The power of resumption, being reserved as a legislative one, is necessarily absolute. If it were subject to judicial control, or conditioned on a preliminary judicial sentence, it would not be legislative power at all.

It is objected that this power is not to be exercised, unless the corporation misuse or abuse its privileges. But, as legislative power must be guided by its own wisdom and knowledge, so it may take its own way of informing itself; and the Courts cannot set aside its action, on their supposition or conviction that it is founded on misinformation. If the Courts must first declare the abuse, then an express legislative function is made dependent upon the judiciary, which is simply absurd. That the law making power should be controlled in its action by previous law is even more palpably so.

These views show plainly enough that the limitation of the legislative power of resumption, to the case of an abuse of the privileges granted, is merely a moral restraint, and not a legal or constitutional one; for it is subject to no supervision, and is guided only by legislative wisdom. Such is its essential nature, if it is a legislative power. The very discretion that enacts is reserved for repeal, and this excludes this act of incorporation from the class *contracts* in the constitution, and ranges it under the class *law;* and no subsequent acts of judiciary or executive officers can change its character.

It may be possible that the act of repeal is unjust in its provisions;

but of that we cannot inquire, if the power exists. Courts and juries may be equally fallible; yet their judgments, within their legitimate province, must be regarded as right. No department of the government is entitled to regard another department with suspicion in the exercise of its peculiar functions. Every form of government, and every department of it is liable to error; but when the special department, which is entrusted with any matter, has pronounced its final decision, we must treat it as right, for there is and can be no power to set it aside.

But I do not believe that this repeal is unjust. It is consistent with the most sincere respect, for those from whom I differ, for me to say that I have a very clear conviction that it is eminently proper and right. And this company could never have been led into this difficulty, if it had not colluded in the impudent fraud of the Franklin Canal Company, for which that company was suppressed by an act of assembly that was most generous in its provisions. If this company had made their road an Erie and New York road, as was intended by their charter, instead of an Ohio and New York road, they would have saved themselves much trouble. The legislature is very indulgent in declaring that they may do it yet. I am for refusing the injunction.

Bill in Equity.

THE ERIE AND NORTHEAST RAILROAD CO.
vs.
JOSEPH CASEY.

KNOX, J.

Believing the Act of the General Assembly which repealed the charter of the Erie and Northeast Railroad Co. to be entirely constitutional, I agree with Mr. Justice Black and Mr. Justice Lowrie, in refusing the injunction prayed for. I will merely add, that in my opinion, this act was not only constitutional but clearly right, and that its terms are fully as favorable to the company as it had any right to expect.

And afterwards, to wit, on the day and year last aforesaid, on motion of St. George T. Campbell, the plaintiffs obtained leave to amend their bill, and it was further ordered and decreed that the defendant shall plead, answer, or demur, to the plaintiffs' bill as amended, within fifteen days from this date.

And afterwards, to wit, on the day and year last aforesaid, the plaintiffs, by their solicitors, filed in the office of the Clerk of the Court aforesaid the amendments to their bill in the words and figures following, to wit:—

SUPREME COURT OF PENNSYLVANIA.

In Equity.

THE ERIE AND NORTHEAST RAILROAD CO.
vs.
JOSEPH CASEY. } No. 2.

December Term, 1855.

And now, January 28th, 1856, on motion of counsel for the complainants leave is given to the complainants to amend the bill filed in this cause, as follows:—

1. By inserting therein and adding thereto after the words, "and has afforded to all persons, and the commonwealth, the facilities and benefits intended by its incorporation," as follows:—

And your complainants aver that they did complete the said work specified in said Act of Assembly, approved the twelfth of April, 1842, so as to bring it into use within the ten years after the passage of said act, and that they did not suffer the said road to go to decay and become impassable for the space of two years, or for any time.

And they further aver, that they have not misused or abused any of the privileges granted by the said act; and that they have not violated their charter by assuming to make an unauthorized location of said road.

And they further say, that in the local construction and completion of their road, and in all things done or omitted by them they designed honestly and faithfully, to the best of their skill, knowledge, and ability, to conform to the acts of Assembly, and to fulfil, perform, and comply with the requisitions of their charter. And that if there was any failure to complete the said road within the time required by law, and if any part of the said road was located where it was not authorized, such failure or location happened by an unintentional mistaken construction of their rights and duties in that behalf, and not by any wilful neglect or default of the complainants.

2d. And further to amend the same by inserting therein, and adding thereto, after the words "by which the continued corporate existence of the complainants was recognized" as follows: And your complainants aver that they did accept the said last mentioned act, and from thence hitherto to have in all respects conformed to the provisions and requirements thereof except to change the gauge of their road as authorized by the act of the eleventh of April, 1853, herein before mentioned.

And that by the said act of the fourteenth of April, 1852, and their acceptance and conformity therewith, the State contracted with the complainants that they should have and maintain their road as it was then located, and should hold, possess, and enjoy, and retain their corporate rights, privileges, and franchises, notwithstanding any failure, neglect, abuse, or misuse before that time suffered, done,

or committed, or any ground of forfeiture, and notwithstanding any claim that might then have been alleged or asserted by the State.

And after the passage of said act of fourteenth of April, 1852, and the acceptance thereof as aforesaid, your complainants expended large sums of money in the maintenance of said road, and in stocking and equipping it for use, amounting to not less than one hundred and fifty thousand dollars, and have issued and sold their bonds to divers persons to raise money for the maintenance and use of said road, since the passage of said act, to an amount exceeding fifty thousand dollars.

3d. And further to amend the same by inserting therein, and adding thereto after the words "as in and by the record thereof to which reference is craved will fully and at large appear" as follows: And your complainants aver, that by the proceedings and decree aforesaid, and in consideration thereof, the Commonwealth undertook, contracted, and agreed with your complainants, that upon their compliance with the orders, decrees, and mandates of this Court, in the case aforesaid, the Legislature would not, for the abuse and misuse alleged in the bill of complaint, and proceedings aforesaid, resume any of the privileges granted to the said company by the act of Assembly, passed the twelfth of April, 1852, and that they should not be or become annulled and void because of any failure or neglect before that time to complete the said road, or of any previous abuse or misuse of their privileges, but that all and singular the rights and privileges granted to said Erie and Northeast Railroad Company by said act, or any act of Assembly supplementary thereto, should be held and enjoyed by the said company, notwithstanding the alleged failure to complete the said road, and notwithstanding the pretended abuse and misuse of their privileges, charged against them in said proceedings.

W. T. HIRST,
EDWIN M. STANTON,
W. M. MEREDITH.

And afterwards, to wit, on the eleventh day of February, in the year last aforesaid, upon motion of George Griscom, Esq., counsel for respondent, and upon filing the affidavits of Joseph Casey, and James Thompson, Esquires, it was ordered by the Court that the time for the filing of the answer of the defendant be extended for the period of ten days from the time fixed by the order of the Court of the 28th ultimo.

And afterwards, to wit, on the twenty-second day of February, in the year last aforesaid, the respondent filed in the office of the Clerk of the Court aforesaid, his answer in the words and figures following, to wit:—

IN THE SUPREME COURT OF PENNSYLVANIA,
Eastern District.

THE ERIE AND NORTHEAST RAILROAD COMPANY vs. JOSEPH CASEY. } No. 2. December Term, 1855.

In Equity.

The answer of Joseph Casey, respondent to the bill above-named.

The said respondent now, and all times hereafter, saving and reserving to himself all benefit and advantage of exception which can or may be taken to the many errors and imperfections in said complainant's bill of complaint for answers thereto, or to such parts as he is advised it is necessary for him to answer unto, says:—

That true it is that by an act of the General Assembly, passed the 12th day of April, 1842, the complainants were created by the same, and by the performance of all things therein required to be done, a corporation by the name and style of "The Erie and Northeast Railroad Company," with power and authority to construct a railroad from the borough of Erie to some point on the eastern boundary line of the township of northeast, in the County of Erie; and that he is informed that said complainants, claiming to act under and by virtue of the provisions of the said act of Assembly, did commence the construction of the Railroad referred to in complainants' bill of complaint on or about the 9th day of August, A. D. 1849, as set forth in said bill; and that, at the time of the commencement thereof, the limits of the borough of Erie extended only to that part of the now City of Erie, comprised between Parade, Chesnut and Twelfth Streets and the harbor of Erie; and that under and by virtue of an act of Assembly of the 15th day of April, A. D. 1851, the City of Erie was incorporated with extended limits. That it may be true, but it is unknown to the respondent, that the Railroad of the complainants was completed from Sassafras Street, in the City of Erie, to the eastern boundary line of the township of Northeast in January, 1842. That as to the several matters in the said complainants' bill of complaint in regard to the acts and doings of the authorities of the borough and City of Erie, respondent is entirely uninformed, and submits that he is not in any manner bound further to notice them, as in nowise or manner could such acts bind or affect the Commonwealth of Pennsylvania, or this respondent in the premises.

The respondent further answering, saith that, by the said act of Assembly of the 12th of April, 1842, incorporating the said complainants, and referred to in their bill of complaint in the sixth section thereof, to which reference is craved, the said Company is authorized to construct a railroad from the borough of Erie aforesaid to some point on the east boundary line of the township of Northeast, in the County of Erie. And in the 7th section of the said act, to which reference is also craved, it is enacted that the said Railroad

"shall be so constructed as not to impede or obstruct the free use of any public road, street, lane or bridge now laid out, opened or built." And in the 10th section of said act, to which reference is also craved, it is further provided, enacted, "if the Company aforesaid do not complete the said road so as to bring it into use within ten years after the passage of the said act, or after the completion shall suffer the road to go to decay and become impassable for the space of two years, then this charter to become null and void." And in the 11th section of said act, to which reference is also craved, it is also further enacted "that if the said Company misuse or abuse any of the privileges hereby granted, the Legislature may resume the rights and privileges hereby granted to the said Company." And the respondent further answering says, that the General Assembly of the Commonwealth of Pennsylvania did pass an act, which was approved on the 6th day of October, 1855, entitled "An act to repeal the charter of the Erie and Northeast Railroad Company, and to provide for disposing of the same," in which, after reciting certain acts of omission, commission, by said Company in relation to the privileges granted thereto, and of abuse and misuse, did in and by the said act, and in pursuance of the power reserved in the aforesaid act of incorporation of the 12th day of April, A. D. 1842, revoke and annul all and singular the rights and privileges theretofore granted to the said complainants by the said act of incorporation, and did resume all and singular the privileges therein granted to them; to which said act of Assembly the preamble and several sections thereof reference is craved, and the same is made a part of this answer, as if herein fully recited and set forth. Which said act of Assembly, passed and approved as aforesaid, having the force and effect of a law of this Commonwealth, the respondent avers that the Legislature could legally and constitutionally pass and enact, and that the same did become a law on the 6th day of October, A. D. 1855.

And the said respondent avers that, by the passage, enactment and approval of the same act, that all and singular the privileges and franchises which had been granted before that time by the said act of the 12th of April, 1842, or by any other act or parts of acts prior to the said 6th day of October, 1855, became annulled, revoked, and the said privileges resumed by the Commonwealth of Pennsylvania, and the said Railroad directed to be taken possession of by the Governor, or by some suitable person to be appointed by him, to take the charge and custody of the same, until it should be further disposed of according to law, to keep the same in repair and good running order for the accommodation of the public in the meantime.

And the said respondent further saith, that in pursuance of the said last mentioned Act of Assembly the Governor of the Commonwealth did, on the second day of November, A. D. 1855, under the great seal of the State, issue a commission to him, the said respondent, empowering and requiring him to take the charge and custody of the said Erie and Northeast Railroad, and to hold and keep the

same under and pursuant to several provisions of the aforesaid Act of General Assembly of the 6th of October, A. D. 1855, and to do and perform all things in relation thereto enjoined and required by the said act to be done and performed.

Your respondent now therefore avers that all his acts and doings in relation to the said Erie and Northeastern Railroad heretofore done, now doing, or intended by him to be done, are and have been under and by virtue of the said commission to him so as aforesaid directed, and under and in pursuance of the provisions of the said Act of Assembly of the date last aforesaid, a copy of which said commission is hereto annexed and marked Exhibit "A," and which he prays may be made part of this his answer, as if the same wherein fully set forth. And the said respondent denies the doing of, or having done, or of intending to do, anything or in any manner interfere with the said road, other than as he is authorized by such commission and appointment to do, under the Act of Assembly aforesaid.

And the said respondent further answering, saith that he is advised that the General Assembly of the said Commonwealth had full power and *and* right to pass the said Act of Assembly, and that the same is not repugnant to the Constitution of the United States, or the Constitution of the Commonwealth of Pennsylvania, and that he is fully authorized to take the charge and custody of the said railroad, under his appointment aforesaid, and pursuant to the provisions of the said Act of Assembly, hold the same until further disposed of according to law, and to do all such other things in the premises as by the said Act of Assembly is required to be done.

The respondent further answering, saith that the said company was bound to locate and construct their road between the termini fixed in the Act of Assembly, and so that the same should not "impede or obstruct the free use of any public road, street, lane, or bridge then opened," &c., and whether any wrongful or erroneous location of the same was wilful, or done under a mistake which the respondent does not admit, was wholly immaterial, the same being a violation of the grant made to them by the said Commonwealth of Pennsylvania, and was and constituted such an abuse and misuse of their rights and privileges granted to them as authorized the Legislature to repeal their said charter by the Act aforesaid.

The respondent further answering, saith that he is advised that there is nothing in the Act of Assembly passed the 14th day of April, A. D. 1852, which should in law or equity estop him from taking the charge or custody of the said railroad, as authorized to do by his said commission, under the provisions of the said Act of the 6th October, A. D. 1855. That the said Act conferred no rights or privileges upon said company but such as are therein set forth and expressed, nor did the said company do anything under the same to raise an equity in their favor.

And the said defendant further answering, denies that the said

complainants accepted and adopted all the provisions of the said last mentioned Act, or that any contract exists or ever did exist between the said commonwealth and the said complainants, as alleged and set forth in their said bill of complaint, to wit: That the said complainants should hold, possess, and maintain their said road as it was then located, and should hold, possess, and enjoy and retain their corporate rights privileges, and franchises, notwithstanding any failure, neglect, abuse or misuse before that time suffered, done, or committed. And he is not informed, nor does he know of any expenditure of money by the said company on the strength of the same, or that if there had been that he would be in any manner or way thereby affected.

The respondent further answering, saith that he is advised that there is no matter or thing in the proceedings and decree of the Court in the case of the Commonwealth *ex relatione* Francis W. Hughes *versus* the Erie and Northeast Railroad Company, No. 7 of December Term, 1853, which the complainants pray reference to in their bill of complaint, that should or does in any way or manner estop or prevent the respondent from exercising the duties of his appointment so as aforesaid made, and for the purpose hereinbefore stated. But on the contrary, he avers that the same proceedings and decrees, to which he also craves reference, establish the facts which the Legislature, in the Act aforesaid, also ascertained to be true, to wit: the misuse and abuse of their corporate privileges by the said complainants.

And he further avers that by reason of the reservation aforesaid, in the said act of incorporation, the legislature had full power to repeal the charter for the causes therein stated, and could not be, and was not, in any manner or way, estopped, debarred, or hindered from so doing, by the proceedings and decrees had and made in the said last mentioned cause.

The respondent further answering, saith to the first interrogatory propounded in the complainant's said bill of complaint, that he was duly appointed by the governor of the commonwealth, under and by virtue of the act of the 6th October, A. D. 1855, to be Commissioner of the Erie and Northeast Railroad, and to take the charge and custody of the same, until it shall be further disposed of according to law. That his said commission is in writing, and under the great seal of the state, a copy whereof is hereunto annexed, to which reference is craved, as if herein fully set forth at large.

The respondent further answering, saith to the second interrogatory of the said complainant, to him propounded in the said bill of complaint, that, in pursuance of the said commission, and under the authority of the said act of assembly of the 6th October, A. D. 1855, he did, on the fifth day of February, A. D. 1856, take the possession, charge, and custody of the same, and to secure and hold the income and revenues thereof, and dispose of the same, as is directed by the aforesaid act, until the said Railroad shall be further

disposed of, according to law, or until his commission and appointment shall be suspended by the appointment of some other person to discharge the duties of the trust aforesaid.

And the said respondent denies all, and all manner of unlawful combinations and confederacies, without this, that there is any other matter, cause, or thing, in the complainant's said bill of complaint contained, material or necessary for the respondent to make answer unto, and herein or hereby well and sufficiently answered, confessed, avoided, traversed, or denied, is true to the knowledge and belief of this respondent. All which matters and things the respondent is ready and willing to aver, maintain, and prove, as this honorable Court shall direct, and hereby prays to be hence dismissed, with his reasonable costs and charges, in this behalf most wrongfully sustained.

JAMES THOMPSON,
for Def't.

STATE OF PENNSYLVANIA,
Erie County, ss:

Joseph Casey, being duly sworn, says that so far as the statements in the foregoing answer contained are within his knowledge they are true, and that so far as his information is derived from others, he verily believes the same to be true.

JOS. CASEY.

Sworn and subscribed before me, this 18th day of February, A. D. 1856.

WILSON LAIRD,
J. P.

And afterwards, to wit, on the tenth day of March, in the year last aforesaid, the respondent, by his counsel, filed in the office of the clerk of the Court aforesaid a copy of his commission, which is filed as an exhibit, in connection with respondent's answer, which commission is in the words and figures following, to wit:—

Pennsylvania, ss: JAMES POLLOCK. [SEAL.]

In the name and by the authority of the Commonwealth of Pennsylvania, James Pollock, governor of the said commonwealth, to Joseph Casey, of the County of Dauphin, Esquire, sends greeting:—

Reposing especial trust and confidence in your prudence, intevety, and abilities, I have, as authorized and directed by the act of the General Assembly of this commonwealth, entitled "An Act to repeal the charter of the Erie and Northeast Railroad Company, and to provide for disposing of the same," approved the sixth day of October, Anno Domini one thousand eight hundred and fifty-five, appointed

you, the said Joseph Casey, to take the charge and custody of said railroad.

You are therefore by these presents appointed and commissioned to take possession of, and also to take and have, the custody and charge of said railroad, until the same shall be further disposed of according to law.

To have and to hold the said office, together with all the rights, powers, and emoluments thereunto belonging, and with all the powers conferred by said act of Assembly, above recited, for the purpose of carrying out its true intent and meaning, unless this appointment and commission shall be by me or other lawful authority supersed or annulled.

Given under my hand and the great seal of the State at Harrisburgh, second day of November, in the year of our Lord one thousand eight hundred and fifty-five, and of the commonwealth the eightieth.

By the Governor.

JOHN M. SULLIVAN,
Dep'y Sec'y of the Commonwealth.

And afterwards, to wit, on the seventeenth day of the month and year last aforesaid, the parties appeared by their solicitors, and on motion of St. Geo. T. Campbell, Solicitor for Complainants, the Court appoint James Sill and George Cutler, jointly, to be examiners to take depositions and other evidence in the city of Erie and Erie County, to be read on the hearing of this cause. And it is further ordered, that at least eight days' previous notice be given to the parties at Erie, before commencing to take testimony: and that the testimony on both sides be closed and filed by the examiners in the office of the Clerk of this Court, for the Middle District, at least two weeks before the day appointed for the hearing of this cause.

On motion of St. Geo. T. Campbell, it is further ordered, that the record in this cause be certified to the Middle District, and the first Monday of May, 1856, be assigned for the final hearing thereof:

And afterwards, to wit, on the said seventeenth day of March in the year last aforesaid, the complainants by St. George T. Campbell, Esq., their Solicitor, filed in the office of the Clerk of the Court aforesaid, their replication to respondent's answer in the words and figures following, to wit:

THE ERIE AND NORTHEAST RAILROAD COMPANY
vs.
JOSEPH CASEY.

Supreme Court. In Equity. December T. 1855. No. 2.

The replication of the Erie and Northeast Railroad Company, Complainant, to the answer of Joseph Casey, defendant.

This repliant saving and reserving unto themselves, all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, say that they will aver and prove the said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver and prove as this honorable Court shall direct, and humbly pray as in and by their said bill, they have already prayed.

ST. GEO. T. CAMPBELL,
for Compt's.

And afterwards, to wit, on the fifth day of May, in the year last aforesaid, this cause came on to be heard, upon complainants' bill of complaint as amended, the respondents' answer and replication thereto, and being argued by counsel, and the Court being fully advised in the premises, and being satisfied that the amendment to the answer as prayed for by the defendant, is necessary to reach the merits of the case, do allow the said amendment to be filed upon terms.

1st. That the testimony on both sides be taken before examiners and closed on the 4th Monday of May instant.

2d. That the final hearing of the cause upon bill, answer, and proofs be had upon Saturday the 7th of June, 1856.

Thereupon the defendant by his solicitor filed in the office of the Clerk of the Court aforesaid, the amendment to his answer under the foregoing order in the words and figures following:—

THE ERIE AND NORTHEAST RAILROAD COMPANY
vs.
JOSEPH CASEY.

In the Supreme Court of Pennsylvania. In Equity.

The said defendant now moves the Court for leave to amend his said answer, by inserting therein, and adding thereto after the words (*on page 7 of the printed answer*) "the Legislature may resume the rights and privileges hereby granted to the said company," as follows:—

And the respondent further answering, saith, that the said complainants did not complete their railroad from the borough of Erie aforesaid to some point on the east boundary line of the County of Erie, within ten years from the said twelfth day of April, A. D. one thousand eight hundred and forty-two, but constructed the same at and from a point south of the boundary line of said borough of Erie, as the same existed at the date of the passage of the said act incor-

porating the said complainants; and did so make and construct their said railroad as to obstruct and impede the free use of the public streets and lanes in the City of Erie; and also did so make and construct said railroad as to impede and obstruct the free use of the public road or highway, called the Buffaloe Road, in the Township of Harbor Creek, in said County of Erie, by which acts of omission and commission the said complainants did violate the provisions of their charter aforesaid, and did misuse and abuse the privileges therein granted to them by the legislature, in such manner as to authorize the said legislature by virtue of the right and power reserved in the said act incorporating the said complainants, legally and constitutionally to resume the rights and privileges theretofore granted to the said complainants, and wholly and utterly to repeal, revoke, and annul the said charter of incorporation.

JOS. CASEY,
Def't.

Dauphin County, ss.

Joseph Casey being sworn, saith, that the facts set forth in the foregoing, so far as they are within his own knowledge are true, and so far as derived from the information of others he believes them to be true.

JOS. CASEY.

Sworn and subscribed before me this 6th May, A. D. 1856.

C. A. SNYDER,
J. P.

And afterwards, to wit, on the day and year last aforesaid, on motion of defendant's counsel, the Court order, that the same examiners who were appointed to take the testimony of complainants, be appointed to take the evidence of the defendant also.

And that the cause of the Cleveland and Painsville and Ashtabula Railroad Company *vs.* the City of Erie, be heard at the same time, with the trial of this cause.

And afterwards, to wit, on the 19th day of May, in the year aforesaid, on motion of defendant's counsel, the Court order, 1st, that the testimony taken by both parties in the case of the Commonwealth Ex. relation, Francis W. Huse *vs.* the Erie and Northeast Railroad Company, No. 7, Dec'r Term, 1853, with the exhibits, maps, and diagrams, &c., attached to the record, or given in evidence in said cause, may be read as testimony in this case, on the hearing of the same, as though it had been taken in the cause.

And afterwards, to wit, on the 25th day of May, in the year last aforesaid, the complainants, by their solicitors, filed, in the office of the Clerk of the Court aforesaid, their testimony taken under the order of the Court by Geo. H. Cutler and James Sill, Esqrs., Examiners, which testimony is in the words and figures following:—

IN THE SUPREME COURT OF PENNSYLVANIA,
for the Eastern District.

December Term, 1855.

THE ERIE AND NORTHEAST R. R. Co.
vs.
JOSEPH CASEY. } No. 2.

In Equity.

And now, March 17th, 1856, on motion of St. Geo. T. Campbell, Esq., the Court appoint James Sill and George Cutler, jointly, to be examiners to take depositions and other evidence in the City of Erie and Erie County, to be read in the hearing of the above case, and it is ordered that at least eight days' previous notice be given to the parties at Erie before commencing to take testimony; and that the testimony on both sides be closed and filed by the examiners in the office of the Clerk for the Middle District at least two weeks before the day appointed for the hearing of the cause.

Eo die, And now on motion of St. Geo. T. Campbell, Esq., it is ordered that the record in this cause be certified to the Middle District, and that the first Monday of May, 1856, is appointed for the final hearing thereof.

December Term, 1855. No. 1.

THE CLEVELAND, PAINESVILLE, AND ASHTABULA RAILROAD COMPANY
vs.
SAME.

In Equity.

Eo die, On motion of St. Geo. T. Campbell, Esq., it is ordered that the record in this cause be certified to the Middle District, and that the first Monday of May, 1856, is appointed for the hearing thereof.

Certified from the record.

In testimony whereof I have set my hand and affixed the seal of the said Supreme Court at Philadelphia, this seventeenth day of March, A. D. 1856.

[L. S.] J. NULLET,
pro Prothonotary.

JAMES THOMPSON and JOSEPH CASEY:—

SIRS: Take notice, that in pursuance of the order embraced in the above, the testimony of witnesses will be taken before the examiners named in said order, or one of them, at the office of James Sill, Esq., one of said examiners, commencing upon Monday the 31st day of March instant, and continuing from day to day until the testimony which the plaintiffs in the suits embraced in the above order

wish to take, is completed—the office of James Sill is in the East Ward of the City of Erie, and upon the north side of the Diamond, commencing at 2 o'clock P. M. of the said day.

JOHN H. WALKER,
Att'y for Pl't'ffs.

John H. Walker, being duly sworn, says, that the foregoing notice was served by mailing a copy thereof to Joseph Casey, and that the same was served on James Thompson more than eight days ago.

JOHN H. WALKER.

Sworn and subscribed before me, March 31, 1856,

JAMES SILL,
Examiner.

In compliance with the foregoing notice the examiners met at the time and place indicated in the foregoing notice, when Mr. Walker appeared as counsel for complainants, and E. Babbit appeared in behalf of respondents, and William Brewster was sworn and testified as follows:—

I reside in Erie. I am 27 years of age, and am in the broker's business.

Question. Were you in the employ of the Directors of the Erie and Northeast Railroad Company during the construction of the Erie and the Northeast Railroad? and if so, in what capacity, and did you continue in such employ until the railroad was completed?

Answer. I was in the employment of the company as one of the assistant engineers, and was so employed until the railroad was completed.

Q. State when the Erie and Northeast Railroad was completed. When the first locomotive with a train of cars passed over the same.

A. It was completed so that trains could run over it in January, 1852. The first train passed over the road on the 10th day of January. I passed over it in that train.

Q. Has the Erie and Northeast Railroad been used and operated from the 10th day of January, 1852, to this time?

A. It has.

Q. State whether the Erie and Northeast Railroad is a link in a chain of railroads connecting Buffalo, New York, Boston, &c., on the east, with Cleveland, Cincinnati, St. Louis, Chicago, &c., on the west—that is, a link in a chain of railroads connecting Eastern and Western States.

A. It is.

WM. BREWSTER.

Sworn and subscribed to before us, March 31, 1856,

JAMES SILL,
GEO. H. CUTLER,
Examiners.

J. C. Spencer, produced by complainants, was sworn, and testified as follows:—

I reside in Erie; am Secretary and Treasurer of the Erie and Northeast Railroad Company, and am 42 years of age.

Q. State whether the stockholders of the Erie and Northeast Railroad accepted the provisions of the Act of April 14th, 1852, relative to said road, entitled an Act to incorporate the Northeast Cemetery in the County of Erie "and for other purposes." If so accepted, state whether the same was by resolution or not, and if by resolution whether the same was entered in the books of the Erie and Northeast Railroad Company; append a certified copy of the resolution of acceptance to your answer to this question.

A. The act was accepted by a resolution of the stockholders, at a meeting of the stockholders called for that purpose, and the resolution of acceptance was entered on the books of the company.

This paper is a certified and true copy of the call for the meeting of the stockholders and of their proceedings thereon, accepting the provisions of said act. It is signed by myself and the examiners, and appended as Exhibit *A*.

Q. State the amount of stock issued by the Erie and Northeast Railroad Company as the same appears on the books of the company, from the 14th of April, 1852, to the 19th of November, 1855 (the date of the commencement of this suit); also the amount of bonds and obligations given by said company within said time; also amount expended in the construction and repair of said road from the commencement of the same to November 17th, 1853 (the date of the contract between the Erie and Northeast and Buffalo and State Line Railroads); also the amount paid for rolling stock for said road within said time; append a certified true copy from the books of the company of the same to your answer to this question.

A. The amount of stock issued was four hundred and sixty-seven thousand eight hundred and fifty. The amount of bonds and obligations given by the company in that time was one hundred and twenty-seven thousand seven hundred and sixty-six dollars. The amount expended in the construction and repair of said road from the commencement of the same to November 17th, 1853, was (693,660 19) six hundred and ninety-three thousand six hundred and sixty dollars and nineteen cents.

The amount paid for rolling stock for said road in said time was (83,815 81) eighty-three thousand eight hundred and fifteen dollars and eighty-one cents. This paper marked as "Exhibit B," and signed by myself and the examiners, is a true copy of said amounts.

Q. State whether the Erie and Northeast Railroad Company has from the 15th of January, 1853 (the date of the acceptance of the act of 14th of April, 1852), held its elections, voted and otherwise acted under the provisions of said act.

A. They have.

J. C. SPENCER.

Sworn to and subscribed before us, March 31st, 1856.

GEO. H. CUTLER,
JAS. SILL,
Examiners.

John W. Walker, produced by complainants, was sworn, and testified as follows:—

I reside in Erie; am an attorney at law; am 24 years of age.

Q. State whether you acted as one of the judges at an election of the directors of the Erie and Northeast Railroad since the 15th of January, 1853, and if so whether the stockholders at that election voted under the provisions of the act of 14th of April, 1852?

A. I acted as one of the judges at the last election of directors, held January, 1856. The stockholders voted under the provisions of the act of 14th of April, 1852.

JOHN W. WALKER.

Sworn to and subscribed before us, March 31st, 1856.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Cyrus C. Dennis, produced by complainants, was affirmed, and testified as follows:—

I reside in Buffalo, N. Y. I am 50 years of age; and am superintendent of the Buffalo and S. L. Railroad.

Q. Is not the Erie and Northeast road a link in the chain of railroads connecting eastern and western States?

A. It is.

Q. State what proportion of trade and travel upon the Erie and Northeast road goes from the west to the east, as compared with what goes from the east to the west.

A. I am not able to answer positively; but, from observation, say that there are about five passengers go west to three east, and that there are about two tons of freight go east to one west. The receipts from the eastern and western trade would be nearly equal.

Q. State the amount received for tonnage per ton per mile over the Erie and Northeast Road, passing from the west to the east on through freight.

A. The receipts per mile per per ton on the Erie and Northeast Road for all freights average 27.10 cents per ton per mile; that would give the Erie and Northeast Road about 52 cents a ton.

My opinion is that freight bound from the west to the east would not average more than 48 cents per ton for the Erie and Northeast Road.

Q. What proportion of the freight earnings is required for the expense of doing the work?

A. Two-thirds.

Q. What would this reduce the nett earnings to for freight from west to east, over the Erie and Northeast Road?

A. Sixteen cents a ton.

Q. Is that inclusive or exclusive of the tax imposed on the Erie and Northeast Road by the Act of October 6th, 1855?

A. The tax to the Commonwealth would have to come out of this sum.

CYRUS C. DENNIS.

Affirmed and subscribed before us, March 31, 1856.

GEO. W. CUTLER,
JAMES SILL,
Examiners.

Francis H. Tows, produced by complainants, was sworn, and testified as follows:

I reside in Buffalo, am 43 years of age, and acting Secretary and Treasurer of the Buffalo and State Line Road.

Q. State the expense incurred and paid by the Erie and Northeast Railroad exclusive of running expenses, from November 17th, 1853, to 15th November, 1855, and append a statement of the same to your answer to this question.

A. Seventy-seven thousand eight hundred and forty-six dollars, ten cents [$77,846 10]. This paper signed by the examiners and myself, and appended to my testimony as "Exhibit C," is a true statement. My office is kept in Buffalo.

Cross-examined by Respondents.

Q. Have you any means of knowing the expenditures of the Erie and Northeast Railroad except from the report of its agents?

A. The reports of the disbursing officers are all made to our office and audited there. It is from those reports and vouchers that I make these reports. All the vouchers for money disbursed pass through my hands.

FRANCIS H. TOWS.

Sworn to and subscribed before us, March 31, 1856.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

John McKiernan, produced by complainants, was affirmed and testified as follows:

I reside in Buffalo. I am about 35 years of age, and paymaster of the Buffalo and State Line Road.

Q. State, if you can, the expense incurred and paid for, and an account of the Erie and Northeast Railroad Company from Novem-

ber 17th, 1853, to November 15th, 1855, exclusive of running expenses.

A. The amount is [$77,846 10] seventy-seven thousand eight hundred and forty-six dollars and ten cents. I probably paid these sums. I make my reports to the office of the Secretary and Treasurer, and it is from these that Mr. Tows and myself draw these figures.

Q. State whether you paid all the accounts that you reported to Mr. Tows as set forth in the statement appended to his answer.

A. I paid all the accounts that I reported to Mr. Tows.

Cross-examined by Respondents.

Q. Do you keep your office in Buffalo?

A. Yes.

Q. How long have you been engaged in the capacity of paymaster to the Buffalo and S. L. Railroad?

A. Since the 11th of November, 1851.

Q. How long have you paid the expenditures of the Erie and Northeast Road from your office?

A. Since it was operated by the Buffalo and State Line Railroad.

Q. To whom did you pay the seventy-seven thousand eight hundred and forty-six dollars?

A. I could not name the individuals to whom I paid it. I have the vouchers for all sums that I ever paid out.

Q. Do you personally know that those vouchers were for expenditures actually incurred by the Erie and N. E. Road? If so, how do you know it.

A. All the vouchers that I pay for the Erie and N. E. Road, I know to be for that section of the road from Erie to the State Line. I know it, because I pay them on that line, of course.

Q. Do you not pay those vouchers at your office in Buffalo? And if not, where do you pay them?

A. The majority of them I pay on the road, because I go over the road. Sometimes I may happen to pay at my office, but I know it to be for that section of the road.

Q. Do you know that you paid out the whole of the seventy-seven thousand eight hundred and forty-six dollars, on the Erie and Northeast Road?

A. I only know from gathering it from the books of Mr. Tows who has the reports of my payments, as to the amount. That amount was gathered from the books by Mr. Tows and myself. I don't know whether my vouchers cover all that amount or not, for I did not gather the sum from my vouchers, only in conjunction with Mr. Tows from his books.

Q. What proportion of what you did pay was paid out on the line, and what in Buffalo, or elsewhere?

A. It would be impossible for me to say, as it runs through two years' time.

JOHN McKIERNAN.

Sworn to and subscribed before us, March 31, 1856.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Samuel S. Spencer, produced by complainants, was sworn, and testified as follows :—

I reside in Erie. I am an attorney-at-law, and am 29 years of age.

Q. State whether you were present at an election of Directors of the Erie and Northeast Road by the stockholders, when that was, and whether the election was held under the provisions of the Act of the 14th of April, 1852.

A. I was present at the election in January, 1855. It was under the act of April 14th, 1852, that the election was held.

S. S. SPENCER.

Sworn to and subscribed before us, March 31, 1856.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

William S. Brown, produced by complainants, was sworn, and testified as follows :—

I reside in Erie. I am 29 years of age, and freight agent at Erie of the road between Erie and Buffalo.

Q. Is or not the Erie and Northeast road a link in a chain of railroads connecting eastern and western States?

A. It is.

Q. State what proportion of trade and travel upon the Erie and Northeast road goes from the west to the east in comparison with the amount which goes from the east to the west.

A. There is at least two tons of freight goes east to one that goes west. The passengers I have no means of knowing personally, except from seeing the trains pass through. It is my opinion that there are five going west to three going east.

Q. State the amount received for tonnage per ton per mile over the Erie and Northeast road, passing from the west to the east on through freight.

A. I made an estimate on that, and assuming that the Erie and Northeast Railroad get one-fourth of the gross earnings which I have always understood, I made it 46 cents a ton over the Erie and Northeast road from Erie to the State Line.

Q. What proportion of freight earnings is required for the expense of doing this work?

A. I have no figures to guide me in making an estimate.

W. S. BROWN.

Sworn to and subscribed before us, March 31, 1856.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 5 1-2 P. M., examiners adjourned until April 1st, 1856, at 8 1-2 A. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 9 A. M., April 1st, examiners met, when Wm. Case, produced by complainants, was sworn, and testified as follows:—

I reside in Cleveland, Ohio, and am President of the Cleveland, Painesville and Ashtabula Railroad Co.

Q. State where you reside, how long you have been concerned in the construction and operation of railroads, what is your connection now with the C. P. and A. road, and whether the Erie and Northeast Railroad is a link in a chain of railroads connecting eastern and western States.

A. I reside in Cleveland. I have been for the last six years concerned in the construction and operation of railroads. I am now President of the Cleveland, Painesville and Ashtabula Railroad Company. Cleveland is the western terminus of that road, and Erie the eastern. The Erie and Northeast road is a link in the chain of railroads connecting the eastern and western States.

Q. Is it not now, and has it not for some time past been customary and necessary for Railroad Companies on connecting lines to give through tickets for freight and passengers, and divide among the respective roads so connecting, in proportion to their respective lengths; and is there or not an arrangement in the line of road of which the Erie and Northeast is a portion, connecting Boston, Buffalo, New York, &c., on the east, with Cleveland, Cincinnati, Chicago, St. Louis, &c., on the west?

(Respondents except to the above question as leading and irrelevant, and witness said):—

A. It is customary and necessary, to preserve comity between the roads, to sell thro' tickets for passengers, and it is customary to establish through rates for freight, and to divide the same according to the different lengths of the respective roads. These are arrangements established over all those lines connecting eastern and western States and passing over the Lake Shore Line, and divided, to the best of my knowledge, *pro rata*, according to the lengths of the roads. It is divided between Cleveland and Buffalo, exactly according to the length of the roads.

Q. State, if you can, the rate for passengers from Cincinnati to Buffalo, and from Chicago to Buffalo, what portion of that is allowed to the line of roads between Cleveland and Buffalo, and between

Erie and Buffalo, and what would be the proportion of that to be paid to the Erie and Northeast road, allowing that road the one-fourth of the sum payable to the road from Erie to Buffalo.

A. There are different prices for tickets, according to the place from which the passenger goes. The proportion of a ticket from Cincinnati to Buffalo is nine dollars and a half on a New York ticket, or Boston, or Philadelphia ticket, of which the proportion belonging to the Erie and Northeast road is forty-eight cents, they being allowed by arrangement one-fourth. If they stop at Buffalo, however, it is ten dollars. The rate from Chicago to Buffalo, on an eastern ticket, is thirteen dollars, of which, the proportion between Cleveland and Buffalo, is four dollars and forty-two cents. The proportion to the road between Erie and Buffalo would be two dollars and twelve cents, and the proportion to the Erie and the Northeast road would be fifty-three cents.

Q. What, in you opinion, is the necessary cost to carry a passenger over the Erie and Northeast road per mile, according to the arrangement spoken of in the last answer, allowing the Erie and Northeast road one-fourth of the sum received by the road from Erie to Buffalo, and what would it at that rate per mile per passenger amount to over the Erie and Northeast road, what in gross, and what would this leave after paying five cents to the State on each passenger for the net receipts per passenger over the Erie and Northeast road?

A. It necessarily costs more to do business on a short road than on a long one. Run as this road is, and stocked in common on the whole line from Erie to Buffalo, I should say the cost would be about eleven mills per passenger per mile, or 21 cents for a passenger over the Erie and Northeast road. But if worked as a separate organization it would cost very much more, which I would have to guess at, but would say 27 or 28 cents .On a Cincinnati ticket after paying the expenses of conveying a passenger over the Erie and Northeast road and the State tax of five cents it would leave the sum of twenty-two cents, and on a Chicago ticket the sum of twenty-seven cents on a passenger after deducting the expense of carrying the passenger and deducting the State tax, or fifteen cents would be left on a Cincinnati passenger, after deducting the expenses of conveyance, and twenty cents on a Chicago passenger after a similar deduction, were the road worked as a separate organization.

Q. State, if you can, the proportion of passengers between Buffalo and Cleveland passing over the line of road eastwardly as compared with that passing westwardly.

A. It is about as ten east to sixteen west.

Q. State, if you can, the proportion of through trade that passes over the line of the road from Cleveland to Erie, destined for an eastern market as compared with that passing over the same road from east to west.

A. The proportions for the past year have been as one hundred

and eighteen going east, to thirty-three going west, including live stock. (118 to 33.)

Q. State, if you can, the rates for freight from Cincinnati to Buffalo and from Chicago to Buffalo, what proportion of that is allowed to the line of road between Cleveland and Buffalo, what between Erie and Buffalo, and what would be the proportion of that to be paid to the Erie and Northeast road, allowing to that road the one-fourth of the sum payable to the road between Erie and Buffalo?

A. I can't give you those prices, and I can only give you what we get on the Cleveland, Painesville and Ashtabula Railroad. We get on the (C. P. & A. R. R.,) taking the express, cattle, and all freight both east and west, an average of three cents per ton per mile. The proportion at this rate over the Erie and Northeast road would be sixty-six cents per ton, by the special arrangement by which the E. & N. E. R. receives one-fourth of the receipts of the road between Erie and Buffalo.

Q. What sum is required to defray the running expenses, for transporting freight over the Erie and Northeast?

A. My answer would be uncertain, but without very close figuring I would say it would be from 28 to 30 cents, governed by the special arrangement between the roads leading from Erie to Buffalo.

Q. State what that would leave to the Erie and Northeast road under the agreement alluded to, after deducting ten cents per ton, payable to the State of Pennsylvania.

A. That would leave 26 cents per ton, operated as the road now is.

Q. If the Erie and Northeast road was operated as an independent road, or with a gauge or width of track different from the roads east or west of it, would the net receipts be as mentioned in your last answer, or if not, what, in your opinion, would be in that case the net receipts of the Erie and Northeast road?

A. If operated as a separate organization without a change of gauge, in my opinion, the expense would absorb more than half of that margin, but with a broken gauge also, the receipts at the prices named would not pay expenses, but the road would be brought in debt, and the road could only be made to pay any profit, or even its expenses, by the other roads constituting the line, contributing the amount that might be necessary on account of this tax and extra expense.

Q. If the net receipts of the Erie and Northeast road, under the arrangement spoken of, would not exceed six or eight cents per ton over the entire Erie and Northeast road, on freight going from the west to the east, would that pay the expenses of running the road, to do that business if operated as an independent road, or with a break of gauge at each terminus?

A. It would not.

(Respondents object to the foregoing question for the reasons

given before, and that it is mere matter of opinion, and coming within the objection made to the second question.)

Q. State, if you please, what if any would be the additional charge in the transportation of freight from the west to east over the Erie and Northeast road, if all freight was compelled to go to the harbor at Erie, and there transshipped, would it equal or more than equal the State tax of ten cents per ton imposed by the act of 6th October, 1855, upon the Erie and Northeast road?

(Respondents object to foregoing question for the reasons given before, and that it is mere matter of opinion.)

A. I think that on account of the increased distance, and the fall of over one hundred feet, which must be raised again to attain the level of the present line, that it would be equivalent to increasing the length of the road 6 or 7 miles. The actual and incidental cost would, in my opinion, be about equal to the tax imposed by said act. Of this the Erie and Northeast Road would have to bear at least one-half, and the other part would be imposed on the road connecting with it.

WILLIAM CASE.

Sworn to and subscribed before us, April 1, 1856.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At ¼ to 12 Examiners adjourned until April 14th, at two P. M.

GEORGE H. CUTLER,
JAMES SILL,
Examiners.

Exhibit A.

Meeting of Directors.

Present—C. M. Reed, Pres't, Jno. A. Tracy, Jno. Scouller, Smith Jackson, M. Courtright.

On motion, the following preamble and resolutions were submitted and passed unanimously:

Whereas, Doubts and differences of opinion have been entertained as to the binding obligations of the Gauge Law passed by the Legislature of this State the 11th day of March, 1851, on this Company,

And whereas, By an amendment to the Act of Incorporation of this Company, entitled among other things an Act to change the mode of voting in the Erie and Northeast Railroad Co., passed the 14th day of April, 1852, the principles of the Gauge Law have been incorporated, and it is proper and necessary before the annual election of Directors of said Company, that the said amendment should be submitted to the stockholders for their acceptance or rejection, therefore

Resolved, That a meeting of the stockholders of said Company be and is hereby called to convene at the office of said Company in the city of Erie on the 15th day of January next, at 10 o'clock A. M. of said day, to determine whether they will or will not accept of the said act of 14th of April, 1852.

Resolved, That the Secretary shall give notice of said meeting in at least four newspapers in the city of Erie, one in the city of Buffalo, and two in the city of New York.

In compliance with the foregoing resolution, I have given notice of said meeting of the stockholders, by having it published in the Erie Chronicle, Gazette, Commercial and Observer, Buffalo Express, New York Tribune and Semi-Weekly Express.

J. C. SPENCER,
Secretary.
GEO. H. CUTLER,
JAMES SILL,
Examiners.

[*Copy.*]

At a meeting of the stockholders of the Erie and Northeast Railroad Co., held in accordance with a call of the Directors of said Company, to refuse or accept of the provisions of an act of the Legislature of the State of Pennsylvania, approved the 14th day of April, 1852, entitled among other things, an act to change the mode of voting in said Company:—

The meeting was organized by appointing John H. Walker, Esq., Chairman, and Miles W. Caughey Secretary.

On motion of Elijah Babbitt, the following resolution was unanimously adopted:

Resolved, That this meeting of the stockholders of the Erie and Northeast Railroad Company do hereby accept of and adopt the provisions of the act of the Legislature of Pennsylvania approved the 14th day of April, 1852, entitled among other things an act to change the mode of voting in the Erie and Northeast Railroad Company.

On motion, the meeting then adjourned.

JOHN H. WALKER,
Chairman.
MILES W. CAUGHEY,
Secretary.

Office Erie and N. E. R. R. Co., Erie, Jan. 15th, 1853.

Exhibit "B."

Statement of accounts, &c. of Erie and N. E. R. R. Co.:

Stock issued by the Erie and N. E. R. R. Co. (by transfer and otherwise) on the books of the Company at Erie, since April 14th, 1852, to Nov. 19th, 1855,	$467,850 00

Bonds and obligations given by said Company since 14th April, 1852, to Nov. 19th, 1855,	$127,766 00
Amount expended in the construction of the Erie and Northeast Railroad, charged to construction account, from the commencement of the Road to Nov. 17th, 1853, at which time the contract was entered into with the Buffalo and State Line R. R. Co.,	693,660 19
Amount of cost of rolling stock for said Road to the 17th November, 1853,	83,815 81

I certify the above are extracts from the books and accounts of the Erie and Northeast Railroad Company, and to the best of my knowledge and belief are correct.

J. C. SPENCER,
Secretary E. and N. E. R. R. Co.

GEO. H. CUTLER,
JAMES SILLS,
Examiners.

Exhibit C.

Statement of expenses incurred and paid for and on account of the Erie and Northeast Railroad, from the 17th November, 1853, other than running expenses, to Nov. 15th, 1855, viz: for

Superstructure, including ties, iron, chain, spikes, &c. &c.,	$9,665 07
Station house, freight houses, car houses, shops, &c.,	31,959 30
Passenger, baggage and freight cars, locomotives, &c.,	36,221 73
Total,	$77,846 10

FRANCIS H. TOWS.

GEO. H. CUTLER,
JAMES SILL.
Examiners.

ERIE AND NORTHEAST R. R. COMPANY
vs.
JOSEPH CASEY.

In Supreme Court, Middle District, Penn'a. Bill in Equity, and answer filed.

And now, to wit, May 6, 1856: The Court being satisfied that the amendment to the answer moved for by Mr. Casey is necessary to reach the merits of the case, do allow the said amendment to be filed upon terms.

1st. That the testimony on both sides be taken before examiners, and closed on the 4th Monday of May instant.

2d. That the final hearing of the cause upon bill, answer, and proofs, be had upon Saturday, 7th June, 1856.

On motion of Mr. Casey, the Court appointed the same examiners who took proofs before. 6 May, 1856.

I do hereby certify that the above and foregoing is a true extract from the minutes of said Court.

[L. S.] Witness my hand and the seal of the Supreme Court for the Middle District of Pa. this 6th May, 1856.

WM. H. MILLER,
Proth. of Supreme Court.

JAMES THOMPSON, ESQ.,
Attorney for Respondents,

SIR: You are hereby notified that in pursuance of the rule and order, the testimony of witnesses will be taken by the complainants, before George H. Cutler and James Sill, Esqrs., Examiners appointed by the Court, at the office of James Sill, in the East Ward of the city of Erie, Erie County, Penn'a, upon Monday the 19th day of May instant, commencing at 1 o'clock P. M. of said day, and continuing from day to day until said testimony is complete.

JNO. H. WALKER,
Att'y for Plaintiffs.

Erie, May 10th, 1856.

Jno. H. Walker being sworn, doth depose and say, that a copy of the above rule and notice was served upon James Thompson, attorney for the defendant, upon the day the notice bears date, and that he mailed a copy of the same to the defendant Joseph Casey, at Harrisburgh, Dauphin County, Pa.

JNO. H. WALKER.

Sworn to this 19th of May, 1856.

May 19th, 1856, sworn and subscribed before me.

JAS. SILL,
Examiner.

May 19th, 1856, the Examiners met at the office of James Sill, in the city of Erie, at the time mentioned in the foregoing notice, when Mr. Walker being present as counsel for complainants.

Milton Courtright being produced by the complainants was sworn and testified as follows: I reside in Erie, am an engineer, and forty-five years of age.

Question. Were you the Chief Engineer in the location and construction of the Erie and Northeast Railroad? If so, when was the road located, and when was the road completed?

Answer. I was the Chief Engineer during the location of the road until it was located. It was located in the months of April and May, 1849. It was completed in the latter part of 1851 or early in January, 1852.

Q. State, if know, why the Erie and Northeast was located south of Twelfth Street, and upon the line on which it was finally constructed?

A. I considered it the best ground for the road, and the best route to bring it into the borough. The part of the town through which the road runs was sparsely settled. It crosses the streets at right angles, or nearly so, and upon the line of lots, and the grade was there capable of being as well adapted to the crossings, I think, as was possible upon any line that could be located through the borough.

Q. State who were the Directors of the Erie and Northeast Road at the time of its location and during the construction thereof, and whether the whole line was located, and the road constructed where it is with the approbation of all the Directors.

A. At the time of its location the Directors were Charles M. Reed, Henry Cadwell, Smith Jackson, A. W. Brewster, James Williams, William Kelley, and myself. Wilson King was afterwards made a Director in place of A. W. Brewster, deceased. The straight line as located in Erie and Harborcreek was approved unanimously by the Directors present in May, 1849.

Q. On whose motion was the straight line adopted in May, 1849?

A. I think it was on the motion of Mr. Kelley, seconded by Mr. Williams.

Q. Was there among the Engineer corps, in the Board of Directors, or among the citizens of Erie, anything said during the location or construction of the road, that locating and constructing it within the limits of the borough as enlarged by the act of April 10th, 1848, and outside of the original limits of the borough as established by the act of 29th of March, 1805, would, or could, in any way come in conflict with or violate the charter of the Erie and the Northeast Railroad Company?—state fully.

A. Not to my recollection. I certainly considered the location that was made a literal compliance with the Act of Incorporation.

Q. State why you, as the Chief Engineer of the Company, recommended the location and construction of the road where it was located and constructed in Erie, and in the township of Harborcreek, where the railroad crossed the old Buffalo Road; and also state, as far as you know, why the Directors adopted the location you recommended, and constructed the road upon that ground both in Erie and in Harborcreek.

A. It was located in Erie for the reasons I stated in answer to question second. I did not consider that I would be justifiable in making a crook where the railroad crossed the Buffalo Road in Harborcreek, where a straight line could be made as cheaply with grades equally favorable, and where with a slight change the Buffalo Road (where it and the railroad came in contact) could at the same time be made shorter and better, as was the case there. It seemed all wrong to me that a line of railroad should be made to curve

around a short bend in the public road, where both would be improved by making them straight without prejuding the interests of any one. As to the Directors, I suppose that they thought it the best line. Mr. Kelley's and Mr. Brewster's sentiments in reference to Harborcreek are embodied in the report made to the Directors.

Q. State at what grade the Erie and Northeast Railroad crosses Ash Lane, Parade, German, Holland, Turnpike, Peach and Sassafras Streets, in the City of Erie, and whether State and French Streets are not crossed by bridges of such height and span that carriages and wagons with any load might safely pass under the railroad. State, also, at what grade the Buffalo road in Harborcreek was crossed by the railroad.

A. It crosses all the streets named near grade except State and French, which are crossed over by bridges. I do not think the grade of the road could be any better adapted to the streets than it is. Particular pains were taken to adapt the grade to the streets in order to make the crossings convenient. I think that there is sufficient room under the bridges for teams with loads to pass without any inconvenience. The grade in crossing the Buffalo road at Mills' corresponded about with the grade of the road. At Elliott's the crook in the Buffalo road, where the railroad crossed over the Buffalo road twice, was straighted up so as to relieve it of any crossings.

Q. State whether or not the authorities of Erie, during the location and construction of the Northeast road, co-operated with the Company in locating and constructing it where it was recommended by you, and where it was constructed in Erie. State, also, in what way the authorities of Erie co-operated, if they did, with the Company in so locating and constructing the road.

A. The authorities co-operated with the Company in arranging the crossings at French and State, and, I think, at Peach Street, in settling upon the manner in which the streets should be crossed; establishing the grades of the streets, &c. And these crossings were at that time arranged satisfactorily to the city, as I supposed.

Q. State whether, in the intercourse you had with the authorities of Erie as engineer of the Company, as a director of the Company, or as a citizen of Erie, you ever heard during the location and construction of the road in Erie, the suggestion made by any one of the council of Erie, by any citizen of Erie, or by any person, that in locating the Erie and Northeast road where you recommended, was not in compliance with the charter of the Company?

A. I have no recollection of hearing any intimation of that kind until after the road was completed. The first intimation to me that I recollect of anything of that kind was when the difficulties came up in regard to a change of gauge in Dec., 1853.

Q. By respondents. Are you not a director and stockholder in the Erie and Northeast Railroad?

A. I am. The testimony of the witness, Milton Courtright, objected to, on the ground of interest.

Q. Was the Erie and Northeast Railroad located and constructed to the borough line of the borough of Erie, as it was in 1842, within ten years after the date of its charter?

A. It was not, but was afterwards located and constructed to the old borough line under a decree of the Supreme Court. It was in the fall of 1854 and winter of 1855.

Q. How far south of the borough of Erie was the road located and constructed by the Company?

A. I think about sixty rods south of the old borough.

Q. Could not the line of road have been so located and constructed as to have entered the borough at or north of Twelfth Street, and was not such route entirely practicable?

A. It could have been located so as to have entered the borough at or north of Twelfth Street. I think that the farther you went north the more it would have been to the prejudice of the line.

Q. Was not the population along Twelfth Street sparse as far as Sassafras Street at the time of the location of the railroad in 1849?

A. Yes, it was not very thickly settled along there. There were not very many houses on the south side; there were some on the north side.

Q. How far above grade was the road constructed on German and Holland Streets?

A. It may have been from one and one half to two and a half feet above the ground, as it was then. My impression was that when the streets were improved they would be very nearly at grade.

Q. Could loaded teams drive over the railroad at the crossing place of Holland and German Streets when the railroad was finished?

A. I think those streets were not travelled at that time by teams. I think it would not have been good crossing without some work. The streets, I think, were not worked at that time.

Q. How is the crossing of those streets at this time?

A. I cannot say.

Q. Who of the corporation co-operated in locating the road at Erie when it was located, and what did they do?

A. It was, I think, McSparren, Presley Arbuckle and Dunlap. The only things I know of their doing was the consultation about the bridges over State and French Streets, and with reference to the grade of Peach Street.

Q. Was not the line of location ran into the city and across the streets, and the location fixed upon by the Company before the consultation you refer to with the members of the Council?

A. I think the location was fixed, but the grade was, I believe, changed some after that.

Q. What was the height of the bridge over French Street from the ground to the bottom of the stringer, and the width between the bents?

A. My impression at the time was that it was about eleven feet, and the span was between 18 and 19 feet in the clear.

Q. How many bents were there within the limits of French Street as the bridge was located, and what was the width of that street?

A. There were two full bents, and there may have been two others. One near each edge of the street. The street was sixty feet in width, including the sidewalks.

Q. Was there any passage way under the said bridge excepting between the two centre bents being a width of 18 feet?

A. There was I think for persons on foot, and I am not certain but there was on the side for teams.

Q. What is the width of State Street, and what the height of the bridge across it? How many bents are there within the street, and what is the width of the passage way under it?

A. It is one hundred feet wide, including sidewalks. The height of the bridge from the ground to the stringers I think is between twelve and thirteen feet. There must be four full bents and two more (one on each side) near the edges of the street. The width I think is eighteen feet and eight inches in the clear. I was not the engineer of the road during its construction.

Q. Did the corporate authorities you speak of interfere in any way as to the manner of crossing those streets, or as to the manner of constructing the bridges over them?

A. My impression is that they agreed with the company as to the manner of crossing them with bridges. When the road was first located, the company intended to cross French Street a little above grade, and grade the street up to it, but at the suggestion of parties interested and with the concurrence of the town authorities, they were induced to make a bridge over the street and have the street cut down.

Q. In what capacity did the gentleman named act, as a committee, and for what purpose were they appointed?

A. My understanding of it was, that it was as a committee, and appointed to confer with the company as to the crossing of State and French Streets.

Q. Had not the company constructed a portion of their road in the city of Erie before the time you mention that the committee of councils co-operated as to the crossing of State and French Streets?

A. I think they had done some of the grading.

Q. For what distance, and what part of the Buffalo road did the railroad company occupy exclusively in Harborcreek township?

A. I think in the two crossings at Elliott's where the road was changed, it occupied about 24 rods exclusively. The Buffalo road was changed about sixty (60) rods to avoid the crossings. It may have been more, or less. At Mills' and Wagner's it crossed the road diagonally at grade. It may have been between three and four hundred feet in crossing there.

Q. Were not the company notified by the road commissioners of Harborcreek township after they had made their location, and before the construction of the road, to change the location thereof so as not

to interfere with the road as the location was contrary to the seventh section of the act incorporating the company?

A. From seeing such notice in the testimony here I presume that such notice was given, though I had forgotten it and think it was some time when I was not present.

Q. Was the change in the Buffalo road made in Harborcreek township by the consent of the township authorities, or otherwise than by the railroad company themselves?

A. I don't know that it was made by any other authority than the railroad company.

Q. Was not Colonel Irvin Camp an engineer in the employ of the company in the location of the Erie and Northeast Road, and did he not report a line avoiding the occupancy of the Buffalo road, excepting at one crossing, and was not that report communicated to the company and rejected by them?

A. Mr. Camp was the engineer of the company after I left; and to avoid removing some private dwellings which the company had not arranged for, or had no power to move under their charter, and also to avoid the Buffalo road at that place, he recommended a change in the line by making a crook in it, this the company did not think proper to adopt, thinking it better to keep the railroad straight, straighten up the other road to avoid the crossings and satisfy the parties for their dwellings, which they did I believe.

Q. Did not Col. Camp's plan propose crossing the Buffalo road on the east side of Harborcreek where the Buffalo road makes a deflection north, and would his proposed line have occupied more than one hundred or one hundred and fifty feet in crossing the road?

A. His line proposed crossing the Buffalo road within a few rods of where it now crosses at Elliott's, but not so diagonally, and it would not have occupied more than half or two-thirds as much as it does at the present crossing at Mills'. His proposed line would have at that point left the Buffalo road to the south.

Examination in chief resumed.

Q. Was not the Erie and Northeast road constructed and completed into the borough of Erie as enlarged by the act of 1848, before the 10th of April, 1852?

A. It was.

Q. Would not the railroad have been located and constructed to the limits of the old borough, at or north of 12th Street if the company had not supposed that locating and constructing the road into the borough as enlarged by the act of 1848 was a compliance with the charter of the company?

(This question objected to by respondents.)

A. I presume it would. I would have been in favor of bringing it into the old borough if I thought the act required it.

Cross-examination resumed.

Q. Were not the boundaries of the old borough designated and well known at the time the road was located south of it?

A. I suppose it was to most people. The borough lines as they had been at some past time never occurred to me.

Q. Did you not know where the limits of the borough was previous to its change in 1848, and was it not by the Act of 1848 that it was enlarged?

A. I can't say that I know definitely where the old borough lines were. I can't say that I did not know. I knew that the borough had been enlarged—had heard it talked of—but did not think much about it.

Q. Did you in making the location make any inquiry or investigation to ascertain whether you were within the borough as it was in 1842 or not?

A. I did not. I did not think of such a thing. I thought coming into the borough was all that was necessary.

M. COURTRIGHT.

Sworn to and subscribed before us, May 19th, 1850.

GEO. H. CUTLER,
JAMES SILL,
Ex'rs.

Wm. W. Reed, produced by the complainants, was sworn and testified as follows: I reside in Erie, I am a Civil Engineer, and thirty-two years of age.

Q. Were you in the employ of the Erie and Northeast Railroad Company during the location and construction of the road?

A. I was in the employ of the company from the commencement of the location until the road was graded and track half laid. I left the road on the 25th September, 1851.

Q. State if you know why the Erie and Northeast Railroad was located and constructed on the line in Erie and Harborcreek recommended by Mr. Courtright, the Chief Engineer?

A. I suppose it was because it was believed to be the best and cheapest line that could be obtained between Erie and the State Line, and because it was believed to be less inconvenient to the city than if located further north, and the grade of the road could be more easily adapted to the grade of the streets. There is another reason that I might give, that is that the present line ran on the line of outlots, and the line of those lots afforded a route on which a straight line could be drawn for sixteen miles, and avoided two curves which would have been necessary had they commenced further north. I think that ground for depot buildings and right of way were obtained much cheaper than it could have been had the road been located further north.

Q. State whether you heard, while making the surveys for the road at the time of the location of the same, or during its construction, that in adopting the line recommended by Mr. Courtright the charter of the company would be violated?

A. I never heard the slightest intimation during the location or construction of the road that the company were not complying strictly with their charter by making the location that they had made.

Q. Was there among the engineer corps, in the Board of Directors, or among the citizens of Erie, anything said during the location and construction of the road, that locating and constructing it within the limits of the borough as enlarged by the Act of April 10th, 1848, and outside of the original limits of the borough as established by the Act of 29th of March, 1805, would or could, in any way, come in conflict with or violate the charter of the Erie and Northeast Railroad Company?

A. I never heard anything said about it.

Q. State whether or not the authorities of Erie, during the location and construction of the road, co-operated with the Northeast Company in locating and constructing it on the ground recommended by Mr. Courtright. State in what way the authorities of Erie co-operated, if they did, with the company in so locating and constructing the road.

A. They co-operated with the company in constructing the road by appointing a committee to consult about French Street, and also in fixing the grades on Turnpike and Peach Streets. I once as engineer staked out an embankment across French Street. It was afterwards changed to a bridge, as I understood, at the suggestion of the authorities of Erie. I might add the grade across State and French Streets was raised one foot and one-half from where it was at the location, to give more headway under the bridges.

Q. State whether, in your intercourse with the authorities of Erie, if you had any as Engineer, you ever heard during the location and construction of the Erie and Northeast Road the suggestion made by any one of the Council of Erie, by any citizen of Erie, or by any person, that in constructing the Erie and Northeast Road on the ground recommended by Mr. Courtright the charter of the company would be violated, and if such suggestion had been made would you not have been likely to have heard of it?

Above question objected to by respondents, when witness said,

A. I never had any official intercourse with the Councils of Erie on that subject, but I never heard the slightest intimation that the Erie and Northeast Railroad Company, by locating and constructing their road on the line recommended by Mr. Courtright, were violating their charter. I think if there had been anything said about it I would likely have heard of it.

Q. State at what grade the Erie and Northeast Road crosses Ash Lane, Parade, German, Holland, Peach, Turnpike, and Sassafras

Streets in Erie, and whether State and French Streets are not crossed by bridges of such height and span that wagons with any load might safely pass under the railroad. State also at what grade the Buffalo road in Harborcreek was crossed by it.

A. Ash Lane I think was crossed somewhere from two to three feet above the surface of the ground. The grade of the railroad at Parade Street was eighteen inches above the grade of the street. German and Holland Streets were not opened up at the time of the location or during the construction of the road. The grade of the road was from two to three feet above the natural surface of the ground on those two streets. Turnpike and Peach Streets were crossed very nearly at grade.

French and State Streets were crossed by bridges affording sufficient headway for loads of any size to pass, except that loads of hay might be so large as not to pass under French Street bridge. The latter bridge was at the height of ten and one-half feet from the bottom of the sill to the under side of the stringer. The railroad crossed the Buffalo road at Mills', in Harborcreek, at grade.

Cross-examined by Respondents.

Q. Who were the authorities you speak of as having co-operated?

A. I speak of the Council of Erie.

Q. Do you mean to say that the Councils of Erie acted in a body in co-operating in the construction of the road? if not, please to state who it was.

A. They acted by a committee. James D. Dunlap and Clark McSparren. I recollect of their being in consultation with Mr. Camp in regard to French Street bridge.

Q. Did not Mr. Courtright, Mr. McSparren, and Mr. Brewster each own a large quantity of vacant ground at the western terminus and along and near it, at the time of the location and construction of the road. If so, how much did each own?

A. I don't know anything about what they owned any more than that it was the common report that they owned some land near the depot grounds.

Q. How far from the principal business portion of the borough was the terminus of the road fixed, and how far from the harbor was it?

A. It was about three-fifths of a mile from the business portion of the town, and about a mile and a quarter from the wharves.

Q. How soon after the location of the road did the Western Railroad Company commence the location of their road?

A. I think the Western Railroad Company commenced running some lines for their road the fall after the location of the Northeast Road.

Q. What time was the grading done within the limits of the borough of Erie, and when began, for the Erie and Northeast Road?

A. It was finished early in the summer of 1851, by June, I think, and was commenced the fall of 1849.

Q. Is the western terminus of the Erie and Northeast Railroad also the terminus of the Western Road?

A. It was at the time of the completion of the Erie and Northeast Road.

Q. Was not Col. Camp engineer on the road during construction and before the road was constructed in Harborcreek; did he not recommend a line that would avoid the occupation of the Buffalo Road between Elliott's and the crossing-place between Mills' and Wagner's?

A. Col. Camp was chief engineer of the road during its construction, and recommended a change of location in Harborcreek that would have avoided the crossings of the public road except at one point east of Plara Elliott's.

Q. What length of the Buffalo Road was the public excluded from in Harborcreek on account of the location and construction of the Erie and Northeast Railroad?

A. Probably about sixty roads. And at Mills' and Wagner's it crossed the Buffalo Road diagonally about three hundred feet.

Q. When did the Western Railroad called the Franklin Canal Company's Road commence work or became actively employed in the construction of their road?

A. I think in the summer of 1850.

Q. Does the Erie and Northeast Railroad, the road formerly called the Franklin Canal Company's Road, the Buffalo and State Line Road constitute what is called the Lake Shore Road?

A. In general terms the railroads from Buffalo to Toledo constitute the Lake Shore Road, of which these are a part.

Re-examination in chief.

Q. Would not the alteration recommend by Mr. Camp in the township of Harborcreek have changed the Erie and Northeast, from a straight to a crooked road, what was the curve recommended by him, and would a road located on such a line be a judicious location of the line in Harborcreek?

A. The alteration proposed would have changed it from a straight to a crooked road. I may as well state in general terms that I considered any change from the line as recommended by Mr. Courtright as injudicious. It was the best line that could be got.

Q. State whether the Erie and Northeast Company did not open and construct a public road in the township of Harborcreek to supply that portion of the public road interfered with by the company, and was not that a better road than the road occupied by the railroad?

A. They did open and construct a road to supply the place of the road occupied by them, making a straighter and better road than the old one which they occupied.

Cross-examination resumed.

Q. Was the old road occupied or the new road constructed by the consent or at the instigation of the Road Commissioners of Harborcreek township?

A. It was not—so far as I know. It was at the instigations of the inhabitants but not of the Road Commissioners.

Q. What inhabitants of Harborcreek township do you know as instigating or consenting to the occupation of the old road and the construction of the new; please state the names?

A. I understood at the time that the Messrs. Ellott's and Stillman were willing to have the change made and that a petition was sent from the inhabitants in that vicinity, to the Road Commissioners, asking them to authorize a change in the public road.

Q. From whom did you understand or hear this report? do you know anything of the facts about the petition yourself?

A. I don't recollect from whom I heard the report. I know nothing of the petition except from hearsay.

WM. W. REED.

Sworn to and subscribed before us, May 19th, 1856.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 7½ P. M. Examiners adjourned until Tuesday, May 20th, at 3 P. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

May 20th, 3 P. M. Examiners met and adjourned upon request of parties to 5 P. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 5 P. M. Examiners met, when Mr. Walker being present on behalf of complainants, and Judge Thompson for respondents, Miles Boyles produced by complainants was sworn and testified as follows: I reside in Erie, Pa., am 32 years of age, and formerly have been railroading, am now canaling.

Q. Were you in the employ of the Erie and Northeast Railroad Company during the construction of the road?

A. I was during a portion of the time that it was constructed. About nine months. I was not directly in the company's employ; I was doing work on the road.

Q. During the time you were working for the company did you

ever hear it spoken of among the engineers or directors of the company, the Councils of Erie, the citizens of Erie, or by any person, that in locating and constructing the Erie and Northeast Road on the ground on which it was constructed in the then borough of Erie that the company was violating their charter?

A. I never did. The first that I heard anything of its having violated its charter by being constructed in the manner alluded to was in the fall or winter that it was torn up in 1853.

Q. State at what grade the Erie and Northeast Railroad crosses Ash Lane, Parade, German, Holland, Turnpike, Peach, and Sassafras Streets in Erie, and the height of the bridges over French and State Streets in Erie, also at what grade the Buffalo Road was crossed by the railroad in Harborcreek township?

A. Ash Lane is very near grade. There is a little rise there. Parade Street is very near the grade of the plank road as near as I can recollect now. There is a small, light embankment on German Street and a little rise on Holland Street. Neither Holland or German Streets were graded the last time I was there. Peach and Turnpike Streets were crossed by the old Northeast Road at or about grade. The railroad crosses the Buffalo Road at Mills' and Wagner's crossing at or about grade. I have measured the height of those bridges, but I do not remember them now. I gave the heights and lengths in former testimony when I gave the correct statement. The width of bents is eighteen feet on both streets. The height is greater on State Street than on French Street. State Street bridge is twelve feet four inches from the Plank Road to the bottom of the stringers; French Street bridge is nine feet ten inches in height from the street to the bottom of the stringers. These heights and widths I find by looking at my former testimony.

Cross-examined by Respondents.

Q. In what capacity were you engaged? as a hand or had you a job?

A. I had a job.

Q. Did your position or business bring in contact particularly with the councils, citizens of Erie, or with the directors and engineers further than as a contractor you had business with them?

A. My business did not directly bring me in contact with the citizens and councils more than any other man that lived in the place. I did not have intercourse with the directors and engineers any further than as a contractor I had business with them.

MILES BOYLES.

Sworn to and subscribed before us, May 20th, 1856.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 6 P. M. Examiners adjourned until May 21st, at 2 P. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 2 P. M., May 21st, Examiners met, when William Brewster produced by the complainants was sworn and testified as follows: I reside in Erie, am 28 years of age, and in the Banking or Exchange business.

Q. Were you in the employ of the Erie and Northeast Railroad Company during the preliminary surveys, at the time of the location of the road, and during its construction. If so in what capacity?

A. I was engaged as rodman during the preliminary surveys, and an assistant engineer after the location and during the construction.

Q. When were the preliminary surveys commenced; when completed; when was the road located; when was the construction commenced; and when was the road completed?

A. The preliminary surveys were commenced in the month of July or August, 1849. The location was completed and made in May, 1850. The construction was completed in the winter of 1852, so that the first train was run over the road on the tenth day of January, 1852.

Q. Was the road in constant use from its completion in January, 1852, until the time that it was torn up in Erie and Harborcreek in 1853?

A. The road was in constant use from the time of its completion until some time in December, 1853, when torn up.

Q. State if you know the reason why the road was located and constructed south of Twelfth street and within the limits of the borough as enlarged by the Act of April 10th, 1848.

A. The road was located where it was constructed because it there passed through the borough on the line of outlots and because it passed through a portion of the borough that was thinly settled, and property on which to construct depot buildings, engine houses, wood houses, and other necessary buildings, could be procured cheaper than upon any other line unless it would be further south, and because the right of way would not cost them so much as it would were the line to cut lots further north, and also because the line would run along the line of farms, or nearly so, for some distance east of Erie.

Q. During the time of the preliminary surveys, at or about the time of the location of the road, or during its construction, did you hear any member of the Council of Erie, director of the road, or engineer in the employ of the company, or any person, question the right of the company to run the road into the borough as enlarged instead of into the borough as it existed at the time that the Act incorporating the company was passed?

A. I did not.

Q. State whether during the time specified in the previous question it was not the common understanding in Erie that the limits of the borough as they had existed in 1842 were obliterated by the limits as subsequently established, and that locating and constructing the road into the enlarged borough was a compliance with the Act of incorporation?

Respondents object to this question because the common understanding even if it were so could not alter or enlarge the rights and duties granted to and enjoined upon the company by their Act of Incorporation, when witness said

A. As far as I know it was the common understanding that the old lines of the borough were obliterated by the new ones, and that the Act of Incorporation making the borough of Erie the western terminus, the road was built in compliance with the charter in being located and constructed where it now is.

Q. State whether during the time above specified you did not hear citizens of Erie and members of the Town Council say that the road was properly located and constructed south of Twelfth street where it now is.

A. I did hear citizens and members of the Council say that it was located properly. I heard Clark McSparren and Presley Arbuckle say so; Joseph M. Sterrett I think. He was there when we commenced the survey. My father, A. W. Brewster, always said that the road was located properly. He was a director of the Erie and Northeast Railroad Company and Burgess of the Borough of Erie at the time the road was located.

Q. State whether the authorities of Erie did not during the location and construction of Erie and Northeast Railrod co-operate with the company in the location and construction of the road, if so, state in what way.

A. They did co-operate, by the appointing of a committee to arrange the passage by the railroad over State and French Streets, and I heard them say they ought to cross Peach Street at or as near grade as possible. The engineers of the company talked of running a little farther north, and making a slight embankment over French Street; this was changed, I suppose, at the instance of the chief engineer to get a straight line. The line, as at first located, would have caused an embankment of about two feet on French Street.

Q. About the time of the location of the road, were there not cuts or caricatures exhibited in Erie of the railroad running to the harbor, the object of which was to influence the company against locating the road to the wharf, and to locate and construct it where it now is? If so, state what cuts or caricatures.

A. I heard that there were caricatures during the location and construction of the road. I never saw any. The object was to prevent the company from running their road to the harbor. It was called by some Reed's Railroad, and represented as running to Reed's dock.

Q. If there had been anything said by the authorities of Erie, or by any citizen of Erie, or by the citizens of Erie, or by any one, questioning the right of the company to locate and construct the road where it is, would you not have been likely to have heard it?

A. I think I should. I was a resident of Erie, interested in railroads, and the prospects of Erie. If there had been any objections I should have heard them.

Q. State at what grade the railroad crosses Ash Lane, Parade, German, Holland, Turnpike, Peach, and Sassafras Streets in Erie, and the height of the bridges over State and French Streets in Erie, and the grade at which the railroad crosses the Buffalo road in Harborcreek.

A. Ash Lane, it crosses, as near as I can remember, at or a little above grade. At Parade Street, there is a slight embankment. The railroad is now the same grade as the Plank Road, which runs along Parade Street. On German Street, there is an embankment 2½ or 3 feet. At Holland Street, there is an embankment of about a foot. The latter two streets had not been, and are not yet graded. When they are turnpiked, or made, they would be about the same grade as the railroad; they are low and wet, particularly German Street. Turnpike, Peach, and Sassafras, are crossed at or about grade. State and French Streets are crossed by bridges; the distance between the bents is something over 18 feet from the bottom of the stringers to the road, but on French Street, is about 10 feet; that between the stringers and the Plank Road on State Street is something over 12 feet. The Plank Road was built after the railroad bridge was built, which lowered the height some four or five feet, the width of the Plank Road, still leaving some 12 feet or more between the Plank Road and the stringers. At Harborcreek the railroad crosses the Buffalo at or about grade.

Q. Could or not a public road be constructed in the township of Harborcreek, changing the Buffalo road so as to have it pass under the railroad bridge at the Six-mile Creek, and thus make the Buffalo road straighter than it now is, upon as good or better ground than it now is, and avoid crossing the railroad at all? If so, state the length of the Buffalo road to be constructed.

The above question objected to, because it is too leading, and indicates an answer, all except the last clause, and witness said:—

A. A road could be constructed so as to avoid crossing the railroad, which would be straight, or nearly so, until you reach Six-mile Creek, and there pass under the railroad bridge. The road to be constructed would be about one mile in length.

Cross-examined by Respondent's Counsel.

Q. How long since you left the employ of the railroad company, and what have you been engaged in since?

A. It is about four years since I left the employ of the company,

and have been engaged as a clerk in a broker's and exchange office since.

Q. Do you not know that when the bridge over State Street was erected there was no roadway at that time under the bridge, and when the street should be graded, then, that it would be about as it now is with the Plank Road upon it?

A. I know there was no roadway under the bridge at the time it was built. I did not know at what grade a road would eventually be made.

Q. How do you then know that when Holland and German Streets should be graded that the railroad would pass at grade, or on a level with them, as you have stated in your answer?

A. Because Holland and German Streets are somewhat lower where the railroad crosses them on either side, and also from the fact that any new road built through wet or low ground is generally raised or turnpiked.

Q. Was not State Street lower under the bridge than north or south of it, and could you not tell that to level it where it would be raised to as well as you could tell the same thing in regard to Holland and German Streets?

A. I suppose I could. North of the bridge it is considerably lower than it is under the bridge, the creek occupied the street, when the bridge was built, and some portion of State Street under the bridge was higher than on either side.

Q. You say the object of the caricature was to prevent the company going to the harbor with their road, and induce them to locate the same where they did. If you ne er saw the caricature how do you know this?

A. I know it from common report at the time.

Q. At what time was this caricature in existence? Do you mean to say it was during the time of the construction and location of the road?

A. I do not remember the exact time, but as nearly as I can recollect it was during the location or about the time the road was located.

Q. Was it after or before the road was located?

A. It is so long since I can't remember distinctly.

Q. What persons of the city authorities do you refer to that you say co-operated in the construction by appointing a committee to arrange the passage of the road over State and French Streets?

A. Clark McSparren and Presley Arbuckle are the persons I referred to.

Q. Who did you ever hear say that the old lines of the borough of Erie were obliterated by the act enlarging it? And that the location of the road as it was located was a compliance with the charter of the company at the time of the location of it?

A. I think I heard my father say so and Clark McSparren, I do not remember any others particularly.

Q. Did not your father and Clark McSparren own property by and along the railroad in the borough of Erie as located at and near the western terminus of the road, and if so state to what extent?

A. They did. They owned three outlots in connection with Henry Cadwell, south and adjoining the railroad, containing five acres each.

Q. How often have you been examined as a witness by the railroad company since these controversies began including the present time?

A. Three times.

WM. BREWSTER.

Sworn and subscribed before us, May 21, 1856.

GEO. H. CUTLER,
JAMES SILL,
Ex'rs.

J. B. Johnson being produced, sworn and examined, testifies as follows:—

I reside in Erie. I am 38 years of age, and an attorney at law.

Q. Were you a citizen of Erie during the preliminary surveys of the Erie and Northeast Road at the time of its location and construction and from that to this time?

A. I was and have been. I have resided continuously in Erie since 1841 to the present time.

Q. State if you know the reason why the Erie and Northeast Road was located south of 12th Street and within the limits of the borough of Erie as enlarged by the act of 10th April, 1848?

A. I cannot answer definitely or with certainty. Being opposed to that location myself I used whatever influence I had to have another location at Erie adopted. I conversed as well with William Kelly, Wilson King, A. W. Brewster, and perhaps others, who were directors in the company at the time, as also with Irvin Camp their engineer, all of whom strenuously advocated the location south of Twelfth Street, where it was constructed. I conversed with many citizens of Erie unconnected with the railroad company as far as I knew, some of whom were members of the council of the borough at the time, and from what I could learn from all these sources of information, the general expression of the citizens of Erie, the Council of Erie, and the Railroad Company was in favor of the route adopted and by which the road was constructed. I know nothing further of the reasons of the location, being myself warmly opposed at that time to the location adopted.

Q. State whether at the time of the location and construction of the road, you ever heard the right of the company to locate its road where it is questioned as being in violation of its act of incorporation.

A. I never did until the latter part of the year 1853.

Q. If the right of the company to locate and construct its road south of Twelfth Street, and within the enlarged limits of the borough

had been questioned at the time of its location and construction, would you not have been likely to have heard something of it?

(The above question objected to because the answer to it affirmatively would not tend to prove that it was not questioned.)

A. I think I would. I was then a practising attorney in Erie, and then or about that time a member of the Senate of Pennsylvania from this county, mingling with the citizens generally of Erie, and opposed to that location myself, had I heard any such thing or thought it myself I should have used it as an argument to prevent the location.

Q. State whether about the time of the location of the road there were not exhibited in Erie cuts or caricatures of a railroad running to the harbor calculated and intended to influence the company against locating their road to the harbor and in favor of locating their road up town or where it is. If so, state the character of the cuts.

A. From what I saw myself and what was generally reported I answer there were. The best of my recollection is, I saw one in the hands of Sherburn Smyth, and perhaps others; so long a time has elapsed that I can scarcely distinguish between what I saw and what I heard generally spoken of at the time. It was representing a train of cars going between what was called the legs of General Reed, and a steamboat starting from the same point, with some accompanying comicalities which I do not now remember, as I paid little attention to it at the time.

(Above answer objected to by respondent so far as hearsay is given in evidence.)

Q. Did you not at one time act as a civil engineer?

A. I did about the years 1837–38–39.

Q. State whether you have examined the manner in which the Northeast Railroad crosses the streets in Erie; and if so, state whether the streets could be crossed by a railroad obstructing them less than they are by the Erie and Northeast road.

A. I have many times passed over it on foot and in the cars. So far as relates to the streets that are opened and improved, I think they could not.

Cross-examined by Respondent.

Q. Was not the caricature you spoke of as being in the hands of S. Smyth made with a pen, and intended as a burlesque on constructing a road from the depot down State Street and to Reed's Dock, and was not that since the location and construction of the road?

A. As to how it was made, whether with a pen or not, I cannot tell. It was not intended as a burlesque, as indicated in the question, but was intended from what was generally said, as I judged, as a burlesque on constructing the road to the Dock, instead of where it was constructed which was called the straight line. As to con-

structing a railroad down State Street, I don't remember that I heard that generally talked of then. I think it was about the time of the location of the road that I saw the caricature.

Q. Do you mean to say, in your examination in chief, that this caricature and its object were generally spoken of by the citizens of Erie?

A. I mean to say that I heard it frequently spoken of and in connection with the construction of the Erie and Northeast Road to the Harbor of Erie.

Q. Do you wish to be understood that the existence of caricatures made as you have described, was generally talked about in this community?

A. I can answer no further than as I have stated before so far as I have heard. How general, I cannot state.

Q. How many citizens of Erie did you converse with, other than the directors of the R. Co., and what were the names of those whom you say expressed a preference for the up town location in preference to the Dock; or any of them?

A. It is impossible for me to answer at this date, and probably I could not have answered this question at that time as to number. My recollection is not distinct as to those with whom I had some controversy on the subject so far as relates to individuals; the principal of whom was Wm. Kelley, who I believe was a director in the company at the time, Wilson King, A. W. Brewster, James Williams; but generally the directors of the company. Myself desiring to have the location at the harbor adopted. I believe now it would have been better for all interests, if it had been adopted at that time.

J. B. JOHNSON.

Sworn to and subscribed before us, May 21st, 1856.

GEO. H. CUTLER,
JAMES SILL,
Ex'rs.

At 6½ P. M., examiners adjourned until May 22d, at 8½ A. M.

GEO. H. CUTLER,
JAMES SILL,
Ex'rs.

May 22d, 8½ A. M. Examiners met, when the parties being present by counsel, Hon. James Miles, produced by complainants, was sworn, and testified as follows:

I live in Girard Township, Erie County; am a farmer, and 64 years of age.

Q. State how far you reside from the city of Erie; how long have you resided there, and were you in Erie frequently about the time of the location and construction of the Erie and Northeast Railroad?

A. I reside 18 miles from Erie, where I have resided since 1830.

Was in Erie frequently at the time of the location of the Erie and Northeast Road.

Q. About the time of the location and construction of the Northeast Road, did you ever hear from any one the right of the company to locate its road where it is, in Erie, questioned, on the ground that such a location was not in compliance with, but a violation of the charter of the company?

A. No, I never did; I think I never heard it at that time questioned. At the time of its location and construction I don't think I ever heard their right questioned.

Q. When did you first hear the right of the company to locate its road first questioned?

A. It was in the fall and winter of 1853. This was the first that I heard the right questioned by any one.

Q. From intercourse with the citizens of Erie and vicinity, if the right so to locate had been questioned on the ground mentioned in the last question, would you not have been likely to have heard of it?

This question objected to for the reason stated in the objections to a former question of the same kind.

A. I think I would. I had frequent conversations with the people of Erie as to railroad matters about that time; railroad matters were a good deal agitated, and I was mixed up with it.

Q. About the time of the location of the Northeast Road, state whether there were or were not cuts or caricatures exhibited in Erie, of the railroad running to the harbor, intended to influence the company against locating their road to the harbor, and in favor of locating and constructing their road where it now is? And if so, please state what they represented?

A. I recollect of seeing a caricature at that time, representing General Reed standing, with a train of cars running between his feet, running to a boat at the dock in the harbor, and a steamboat leaving the dock. It was a representation showing that General Reed was going to monopolize the whole business with his boats and cars. That was the intention of the caricature, and the general talk at the time. The balance of the people were for the up town location, in consequence of it, I think.

Cross-examined by Respondent.

Q. Was not the cut you saw made with a pen, and was there anything more of it than a railroad car, and locomotive, and steamboat. Was there any dock; if any, was it not Gen. Reed's dock?

A. I think not. I think it was made with some kind of a woodcut, if I recollect right it was not made with a pen. There was on it a locomotive with a car, a steamboat, and Gen. Reed with a car running between his legs. That was all that I recollect.

JAMES MILES.

Sworn to and subscribed before us, May 22d, 1856.

GEO. H. CUTLER,
JAMES SILL,
Ex'rs.

Clark McSparren, being produced by the complainants, was affirmed, and testified as follows: I reside in the city of Erie, the place of my nativity, am engaged in milling, and am 45 years old.

Q. State whether you were a member of the council of Erie during the years 1849 and 1850.

A. I was.

Q. Were you, in the month of December, 1849, appointed on a committee to confer with the Directors of the Erie and Northeast Railroad and their engineer as to leaving a carriage-way and side-walk unobstructed under the bridge over Mill Creek?

A. I was appointed one of a committee on the part of the council for that purpose. It is my impression that Mr. Dunlap, a member of the council also, was with me on that committee.

Q. Did you confer as such committee with the Directors and engineers of such company, as to the duties devolved upon you by the council?

A. We did; not with a full board of Directors, but with the engineer and some of the Directors; I don't remember their number.

Q. Was the bridge over State Street erected by the company in accordance with a resolution of the Borough Council, under which you acted as one of a committee?

A. It was, and received their approval.

Q. State whether, on the 20th of March, 1850, you were not by the borough and council appointed one of a committee to examine and report the propriety of letting the Northeast Company grade down French Street at the point where the railroad crosses that street, and to let the street pass under the railroad bridge, and who constituted committee?

A. Mr. Dunlap, Mr. Arbuckle and myself were appointed a committee to confer with the engineer and Directors of the Northeast Railroad, with regard to the crossing of that street by the railroad. We conferred together. The company were about to build their road on the surface. The surface was nearly at grade, there was a hillock there, and it was debated whether it was better to let the travel pass over or under the road, and we come to the conclusion that it was better to let it pass underneath. This work, the excavation and removal of the earth to make it passable, was to be done at the expense of the Railroad Company.

Q. Did you make an arrangement with the Railroad Company, and did you report that arrangement to the council, and did the council approve of the same; and was the bridge built over that street, in accordance with the arrangements you made with the company?

A. An arrangement was made, and a report was made to the council, which the council approved. The bridge was built over the street in accordance with the arrangement we made with the company.

Q. State whether the borough and council did not, in March, 1850, grant leave to the Erie and Northeast Railroad Company to run their road on Turnpike Street, from its intersection with the railroad to State Street, and down State Street to the harbor.

A. They did.

Q. Please state whether this "Exhibit A" does not contain the borough record of the proceedings of which you have testified.

A. It does, to the best of my knowledge. Said exhibit is signed by myself and the examiners. See page 19.

Q. You say that in 1849 and 1850 you were a member of the town council; state whether about the time of the location of the Erie and Northeast road in Erie, you ever heard the right of the company to locate its road within the enlarged limits of the borough questioned by any one of the borough council, by any Director of the road, or questioned by any one, as a violation of the charter of the company.

(This question objected to for reasons stated in former objection.)

A. I never did hear it agitated at that time. I never heard it agitated until the difficulties commenced with regard to the change of gauge in 1853.

Q. If at that time the right of the Company to locate its road where it is in Erie had been questioned, as a violation of its charter, would you not have heard something of it?

This question objected to for the reasons before stated.

A. I certainly would from my intercourse with the people.

Cross-examination by Respondents.

Q. Were you not appointed a committee in December, 1849, to confer with the Railroad Company or their Engineers, as to leaving a side walk and carriage way unobstructed, under the trestle work on State Street, and was this not the object of your appointment; and had not the Company located their road and determined on a bridge across that street before your appointment?

I was appointed such committee at that time. Such was the object of my appointment—to place the bents at proper distances. I never heard any other plan adopted there than a bridge. They must have located their road before that time.

Q. Were not you, in company with others at that time, the owner of considerable property in the borough of Erie, adjoining the railroad and near its terminus? and if so, state to what extent.

A. Mr. Caldwell, Mr. Brewster, and myself were owners of property adjoining the road. In that neighborhood the company owned about twelve acres, which had been purchased jointly but had been divided.

Q. Was not Mr. Brewster Burgess in 1849 up to the March

election in 2850, and was he not the owner of nine other lots on French Street near the railroad?

A. I think he was then Burgess. He was the owner of no other property only what was created from that division. He owned under this division one-third of an interest in a water privilege of Mill Creek, together with an interest in land equal to nine or eight town lots. On French Street (200 feet north of the railroad), he owned eight lots of eighty feet each. On State Street (north of the railroad 600 feet) he owned two lots, making one hundred and ninety feet on the east side of State Street. This was all the land he owned there, except the interest in the water privilege, and his interest in the Woollen Factory.

Q. Did the Railroad Company construct or do anything toward constructing their road from the depot, or near it, down State street to the harbor?

A. Nothing towards constructing down State Street, anything more than mining a line of survey.

C. W. McSPARREN.

Affirmed and subscribed before me May 22d, 1856.

GEO. H. CUTLER,
JAMES SILL,
Ex'rs.

Presley Arbuckle, produced by complainants, was now sworn, and testified as follows:—

I reside in Erie; I am 51 years of age, and at present in the forwarding and commission business.

Q. Were you a member of the Council of the Borough of Erie in 1850?

A. I was.

Q. State whether, in the month of March, 1850, you were appointed one of a committee to examine and report on the propriety of letting the Erie and Northeast Railroad grade down French Street at the point where the railroad crossed that street, so as to let carriages pass under the railroad, and if you were one of such committee, state whether you acted, made an arrangement with the Company, and what that was; whether that arrangement was reported to the Burgess and Council, and whether they adopted the same; and whether the Company complied therewith.

A. I was at that time one of such committee; I acted. We conferred with the engineer, Mr. Camp, as to the grading of the road, so as to allow the railroad to pass over the street, and the work progressed, according to the arrangement, at the expense of the Company, according to the arrangement which the Committee was authorized to make with the Company. I have no recollection of any report being made to the Council of the completion of the work before I left the Council.

Q. State whether, about the time of the location of the Northeast road, you ever heard the right of the Company to locate and construct its road on the ground where it is located and constructed, questioned by any member of the Council; by any citizen of Erie; or by anybody as a violation of the charter of the Company, because the road was located outside of the borders of the borough as they existed in 1842?

Respondents object to above question for reasons above given.

A. I have no recollection of having heard it spoken of, or the subject agitated at all.

Q. If it had been spoken of, from the fact of your being a member of the Council and a citizen of Erie, do you not think you would have heard something of it?

Respondents object to above question for reasons above given. Witness said,

A. I think I should.

Q. Do you recognize the proceedings of the Council as in Exhibit *A*, annexed to the testimony of Mr. McSparren, as containing the action of the Council of which you were one, as to the action as to French Street?

A. I do. See them at page 19.

Cross-examination by Respondents.

Q. Previous to your appointment on said committee, had not the Company located their road across Ash Lane, Parade, German, Holland, French, State, Turnpike and Peach Streets, and had they not commenced grading the same within the borough?

A. I could not say whether they had commenced grading; I believe the road was located. I could not say whether the work was commenced or not.

P. ARBUCKLE.

Sworn and subscribed before us, May 22d, 1856.

GEO. H. CUTLER,
JAMES SILL,
Ex'rs.

Complainants gave in evidence the 1st section of the act of 1805; the 2d section of the act of 8th of April, 1833; the 3d section of the act of 10th of April, 1848, as to the bounds of the borough, and the 1st section of the act of 14th of April, 2851, incorporating the borough into a city with the limits of the borough, as established by the act of 10th of April, 1848, appended as "Exhibit *B*," and signed by the examiners. See at page 21.

Also the report of William Kelly, A. W. Brewster, and M. Courtright, three of the Directors of the Erie and Northeast Railroad, relative to the location of the road in the township of Harborcreek, appended as "Exhibit *C*," and signed by the examiners. See page 22.

Also a notice given by Thomas Elliott and John Jacks, two of the Road Commissioners of Harborcreek, as to the crossing of the Buffalo road near Wagner's and Mills', which is signed by the examiners and appended as "Exhibit *D.*" See page 24.

Testimony of complainants here ended for the present, and examiners adjourned at 11½ until 2 P. M.

GEO. H. CUTLER,
JAMES SILL,
Ex'rs.

Exhibit A.

At a meeting of the Burgess and Town Council of the Borough of Erie, held Dec. 21st, 1849, the following amongst other proceedings are recorded.

Messrs. McSparren & Dunlap were appointed a committee to confer with the Erie and Northeast Railroad Company and with their Engineer, as to having a carriage way and side-walks unobstructed, under the trestle work across Mill Creek on State street.

At a meeting held March 2d, 1850, by the Burgess and Town Council of the Borough of Erie, the following proceeding amongst others is recorded.

On motion of Mr. Dunlap, it was resolved that a committee be appointed to examine and report the propriety of letting the Erie and Northeast Railroad Company grade down French street at the point where the railroad crosses said street, so as to let teams and carriages pass under said Railroad. Messrs. Dunlap, Arbuckle and McSparren were appointed said committee.

At a meeting held March 8th, 1850, by the Burgess and Town Council of the Borough of Erie, the following is recorded.

Mr. Dunlap, Chairman of the committee appointed to examine the propriety of letting the Railroad Company grade French street, report that they think the street would be better to run under the Railroad trestle than to run over it, and on motion, it was resolved that the same committee be authorized to make arrangements with the Railroad Company to grade said street at that place.

At a meeting of the Burgess and Town Council held March 14th, 1850, the following proceedings are recorded.

On motion, the following resolutions, offered by Mr. McSparren, were taken up:

Whereas, The President and Directors of the Erie and Northeast Railroad Company have applied for leave to lay and use a track of said road from the intersection with the Erie and Waterford turnpike road northerly down State street to the public pier on the north side of the canal basin, and along said street east and west, throughout its length. And whereas, It is believed that said track, under proper regulations, would be beneficial to the citizens and interests of this borough.

It is therefore resolved, by the Burgess and Town Council of the Borough of Erie—

1st. That so far as said Burgess and Town Council have legal power and authority in the premises, the privilege asked as aforesaid be and the same is hereby granted, upon condition, however, that the said track be so laid and used as to present the least possible obstruction to the ordinary travel and business of said street and pier, and located on said street and pier as directed by the Burgess and Town Council, that the owners of property along the same shall have the privilege of connecting with said track by switches or otherwise without charge, and that the cars moving thereon shall be propelled by horse or animal power only. The said grant to continue for and during the period of twenty years next ensuing the date hereof.

2. The said privilege is granted upon the express condition that the said Burgess and Town Council shall not be liable, in any form or manner, for the damage which any individual may in any way sustain, by reason of the laying down or use of said railroad track, but all such damages, if any, shall be paid by said company.

3. The Burgess and Town Council will appropriate three hundred dollars towards the grading of State Street hill, provided the said company appropriate the like sum thereto, said grading to be done under the supervision of the Burgess and Town Council.

4. The said Burgess and Town Council reserve the right to withdraw the privilege hereby granted, provided the use and exercise thereof shall appear to be injurious to the interests and welfare of said borough, but in such case the withdrawal shall be on such terms as will work the least possible injustice to said company.

The foregoing preamble and resolutions were unanimously adopted with the exception of the last clause of the 1st resolution, relating to the duration of the grant, the yeas and nays being called on the question whether the grant should be for twenty years or not. Messrs. M'Sparren and Skinner voted yea, so the question was decided in the affirmative.

At a meeting of the Burgess and Town Council of the Borough of Erie, held October 4th, 1850, amongst other proceedings is the following on record:—

Mr. Camp appeared on part of the Erie and Northeast Railroad Company and asked the Council to take some measures in relation to the grading of Peach and Sassafras Streets; and on motion of Mr. M'Sparren, it was resolved that the Burgess and Town Council meet to-morrow morning at eight o'clock, near the City Mills, to establish a grade for Peach and Sassafras Streets.

At a meeting of the Burgess and Town Council of the Borough of Erie, held October 18th, 1850, is the following record:—

On motion of Mr. Skinner it was resolved, that a committee consisting of Messrs. Carpenter, M'Sparren, and Low, be, and they are hereby appointed to make and report a grade for Peach Street.

At a meeting of the Burgess and Town Council of the Borough of Erie, held October 25th, 1850, is the following record:—

The following grade of Peach Street, reported by Engineer Low, was unanimously adopted and ordered on file. Commencing at the south line of Twelfth Street 1 61–100 feet above the grade bench at the crossing of Peach and Twelfth Street, said bench being 94 82–100 feet above Lake Erie, thence to Penn Street 990 feet elevation, 12 21–100 feet on 1 23–100 feet to 100 feet; thence 330 feet elevation, 8 20–100 feet, or 2 48–100 to 100 feet; thence 660 feet to the Buffalo Road, elevation 6 80–100 feet, or 1 3–100 feet to 100 feet, and ending 122 3–100 feet above Lake Erie.

At a meeting of the Mayor, Select and Common Councils of the City of Erie, held November 10th, 1851, amongst other proceedings are recorded the following:

Whereas the President and Directors of the Erie and Northeast Railroad Company have applied for leave to lay down a track of said road on the north side of Penn Street, and two or three tracks in Ritner Street, for the purpose of giving them access to their wood-house on Penn Street by trains, and for the purpose of enabling them to break up long trains coming into the city, and to back their cars on to the north part of their depot lot, therefore,

Resolved by Select and Common Council of the City of Erie, that as far as the Mayor, Select and Common Council have legal power and authority in the premises, the privilege asked for as aforesaid be, and the same is hereby granted, upon condition, however, that the said track be so laid and used as to present the least possible obstruction to the ordinary travel and business of said streets, and placed as directed by the Council, and good planking to be substantially built and kept in repair, both inside and outside of said tracks by the said Railroad Company.

Resolved further, That the said privilege is granted upon the express condition that the said city shall not be liable in any form or manner for the damage which any individual may in any way sustain by reason of the laying down or use of said railroad track; but all such damage, if any, shall be paid by the said company.

Resolved further, That the Select and Common Council reserve the right to withdraw the privilege hereby granted, provided the use and occupancy thereof shall appear to them to be injurious to the interests and welfare of said city.

COMMONWEALTH OF PENNSYLVANIA,
City of Erie, ss.

L. S.

I certify that the above and foregoing, contained on two sheets of paper, is a correct copy of proceedings had by the Burgess and Town Councils and of the City Councils of the City of Erie, under their respective duties, as appears on their records, in testimony

whereof I have hereunto set my hand and the seal of said city, this 12th day of May, A. D. 1856.

THOMAS MOORHEAD,
Clerk of Select Councils.

This paper, signed by myself and the examiners, is referred to in my testimony as "Exhibit A."

C. M'SPARREN.

We certify to same.

GEO. H. CUTLER,
JAS. SILL,
Ex'rs.

Exhibit B.

An act to erect the town of Erie, in the county of Erie, into a borough and for other purposes, approved March 29th, 1805.

Section 1. That the first section of the town of Erie shall be and the same is hereby enacted into a borough, which shall be called the Borough of Erie, and the east side of Parade Street, the south side of Twelfth Street, the west side of Chestnut Street, and Lake Erie shall be the boundaries thereof.

An act to alter an act entitled "An act to erect the town of Erie, in the county of Erie into a borough," approved April 8th, 1833.

Section 2. That the first section of the town of Erie, in the county of Erie, shall still continue and forever remain a borough under the name and title of "The Borough of Erie," and the east side of Parade Street, the south side of Twelfth Street, the west side of Chestnut Street and the north side of the water-lots in the bay of Presque Isle, shall continue to be the boundaries thereof.

An act, among other things, "to extend the boundaries and police power of the borough of Erie," approved April the 10th, 1848.

Section 3. That the boundaries of the borough of Erie, in the county of Erie, be and are hereby extended so as to include, in addition to what is already included within its corporate limits, the territory and inhabitants included and embraced within the following boundaries: beginning on the east at the north end of Ash Lane, thence southwardly along the centre of Ash Lane to the southeast corner of out-lot No. 273; thence westwardly along the south line and boundary of out-lots Nos. 273, 276, 277, 280, 281, 283, 284, 285, 288, 289, 292, 293, 296, and 297, and including said lots to Liberty Lane; thence northwestwardly along the centre of Liberty Lane and Liberty Street to the bay and harbor of Erie; thence westwardly along the shore of the bay and around the head thereof as far as the shore extends; thence by a direct line across the western opening or channel to the western extremity or end of the Island of Presque Isle; thence around the outside and northern shore of

the island to the eastern end or extremity thereof; thence by a direct line across the eastern channel to the shore of the lake at and near the northeast corner of the sixty acre reservation, called the Government ground; thence along the eastern and southern boundary of said reservation to the north end of Ash Lane, to the place of beginning."

An act changing the government of the borough of Erie to that of a city, approved April 14th, 1851.

Section 1. That the borough of Erie, in the county of Erie, as the same extends and is now incorporated, be and the same is hereby constituted a city, by the name and style of "*The city of Erie.*"

Appended as Exhibit B., being offered as evidence by complainants.

May 22, 1856.

GEO. H. CUTLER,
JAMES SILL,
Exr's.

Exhibit C.

To the President and Directors of the Erie and North Railroad Company.

The subscribers, a committee of the Board, went yesterday to the Six-mile Creek and spent the day in conference with the different individuals owning buildings upon the State Line in that neighborhood.—We are of opinion that a compromise can be had with them all on terms which will be advantageous for the company to accept, except with Twitchell. He seems to be opposed to the board touching him anywhere, and will probably not be satisfied with anything the company can or will do on any line running through his land. We think the only difficulty we will have with the others will be to fix the amount; they probably expect more than the company will feel justifiable in giving. We could get no definite offer from them, but they have promised to be up during the week for further conference and be prepared to make an offer. The committee are of opinion that their offer should be accepted, if anywhere reasonable, as an inspection of the ground shows its great advantages in passing through a thickly settled neighborhood, on the score of security, independent of the question of speed and cost of running, which will always be more or less affected by curves. If a settlement is made with all the others but Twitchell, the committee would recommend a slight curve to the north of Twitchell's house, and between his house and barn. This would be so slight as not materially to affect the road. If settlement cannot be made with the owners of buildings, then we must go round them, as the land does not allow of any removing of buildings without the owner's consent. The question in that event will occur, whether we had better adhere to our straight line, or as near as possible, making slight curves around the build-

ings, or depart from the line through the whole neighborhood, as recommended by Mr. Camp. We examined the question carefully and are clearly and most decidedly of opinion that to adhere to the straight line and curve round the buildings is the true policy. There are many reasons to our mind influencing this decision.

In the first place these several small and slight curves will not probably be more objectionable than the large curve recommended by Mr. Camp. In the next place the road can be made at much less cost, and in the third place it will admit of straightening up hereafter when arrangements can be made with the owners.

On an examination of the ground recommended as the line drawn by Mr. Camp, we find that it will increase the expense of crossing the Six-Mile Creek and Elliot's Run largely, besides having low and worse ground a part of the way.

If a curve to clear all the buildings should be adopted, it seems clear to the committee that one to the south of the road will be much preferable as costing much less. This consideration ought to be decisive; the damages being equal on both routes, and we can see no perceptible difference. In our opinion the damages to the farms on either curve to the north or south will be greater than in the straight line with the curves around the buildings. On putting the question to all the inhabitants interested, whether they would prefer the road to run in the front or rear of them, all said that they would prefer it to run in front; and we are clearly of opinion it will be easier to arrange with them in the straight line, and will cost less to the company.

The committee would therefore recommend that the straight line be adhered to, and that curves be run round such buildings as could not be removed by an equitable and fair arrangement with the owners.

WILLIAM KELLEY,
A. W. BREWSTER,
M. COURTRIGHT,
Com.

Erie, Oct. 11, 1849.

GEO. H. CUTLER,
JAMES SILL,
Ex'rs.

Referred to as Exhibit C.
May 22, 1856.

Exhibit D.

To the President and Directors of the Erie and Northeast Railroad Company.

You are hereby notified that unless the diagonal crossing of the Erie and Northeast Railroad where it crosses the Buffalo or Ridge road, near the residence of Gideon Wagner and John H. Mills in the

township of Harborcreek, is made safe and secure for the public by gravelling and planking the whole road along the whole extent of such diagonal crossing until it is made level with the railway within three days after the service of this notice, the obstruction created by the said crossing will be removed by the undersigned; we have been advised by legal counsel that the crossing as it at present exists is a public nuisance, which we would have a right to abate; and we give this notice in order that the company by a compliance with the request which we have made may prevent the necessity of our resort to such an alternative.

THOS. ELLIOT,
JOHN JACKS,
Road Com'rs of Harborcreek township.

Exhibit D, offered in evidence by complainants.

GEO. H. CUTLER,
JAMES SILL,
Exr's.

And afterwards, to wit, on the 31st day of May in the year last aforesaid, the respondent, by their solicitors, filed in the office of the Clerk of the Court aforesaid, their special plea in bar, and their testimony taken under the order of the Court.

Which plea in bar is in the words and figures following, to wit:—

Special plea in bar, filed by leave of the Court, subject to the objection of complainants, on the 31st May, 1856.

THE ERIE AND NORTHEAST RAILROAD COMPANY
versus.
JOSEPH CASEY.

No. 2 of December Term, 1855, in the Supreme Court, in equity.

The plea of the respondent in the above case to the relief prayed for in said bill.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in said complainant's bill of complaint mentioned, and contained, to be true in such sort, manner and form as the same are therein set forth for plea to the said bill and relief therein prayed, saith, that since the filing of the plaintiff's bill of complaint, and since the filing the answer thereto by the above named respondent, to wit: On the 22d day of April, 1856, an act was passed by the general assembly of the commonwealth of Pennsylvania, approved by the governor of the commonwealth, entitled "An act supplementary to the act incorporating the Erie and Northeast Railroad Company," by the provisions of which said act, among other things, it is provided, "that the Erie and Northeast Railroad, as originally located and constructed, be and the same is legalized and confirmed, and declared to be in full compliance with

the act of incorporation passed the 12th day of April, A. D. 1842, and the supplements thereto, anything in the said acts or omission to the contrary notwithstanding;" and further, the said act provided for the acceptance of the provisions thereof, by a vote of the stockholders of the said railroad company to be held for that purpose; which said meeting of the stockholders, pursuant to a call for that purpose, was held at the office of said railroad company on the 15th day of May, A. D. 1856 (inst.), in the city of Erie, at which time and place a majority of the stockholders representing a majority of the stock of said company, voted to accept the provisions of the said act of the 22d of April, A. D. 1856; and the said act further provided, that the governor should retain possession of the Erie and Notheast Railroad, under the act approved the 6th day of October, A. D. 1855, until the provisions of the act of 22d of April, A. D. 1856, should be accepted as aforesaid; and in the same act it was further provided, that all acts and parts of acts thereby altered and supplied, being in any way inconsistent therewith, should be and are thereby repealed. And the said defendant saith, that from and by the several provisions of the said act, reference being had to the same will more fully and at large appear, and the acceptance of the same by the complainants in this case, that the act of the 6th of October, 1855, entitled "An act to repeal the charter of the Erie and Northeast Railroad Company, and to provide for disposing of the same," was repealed, and is of no further force and effect whatever, and that the defendant is no longer in office, and legally entitled to the custody of the aforesaid Erie and Northeast Railroad, as he was entitled until the repeal of the act of October 6, A. D. 1855, as aforesaid, and the acceptance by the stockholders of the company of the provisions of the act of the 22d April, A. D. 1856, on the 15th May, A. D. 1856, as aforesaid.

Therefore, this defendant doth plead this Act of Assembly, entitled "An Act supplementary to the act incorporating the Erie and Northeast Railroad Company," passed the 22d day of April, A. D. 1856, and the acceptance of the provisions of the same, by a vote of the stockholders at the time and place aforesaid, in bar to the said complainant's bill of complaint, and prays the judgment of this honorable Court that he be hence dismissed, with his reasonable costs and charges in that behalf most wrongfully sustained.

I hereby certify, that in my opinion the above foregoing plea is well founded in point of law.

JAMES THOMPSON,
Att'y for Def't.

Dauphin County, ss:

Before me, the subscriber, a Justice of the Peace, personally came Joseph Casey, defendant in the above case, who, being duly sworn, saith that the above plea is not interposed for delay, and that ac-

township of Harborcreek, is made safe and secure for the public by gravelling and planking the whole road along the whole extent of such diagonal crossing until it is made level with the railway within three days after the service of this notice, the obstruction created by the said crossing will be removed by the undersigned; we have been advised by legal counsel that the crossing as it at present exists is a public nuisance, which we would have a right to abate; and we give this notice in order that the company by a compliance with the request which we have made may prevent the necessity of our resort to such an alternative.

THOS. ELLIOT,
JOHN JACKS,
Road Com'rs of Harborcreek township.

Exhibit D, offered in evidence by complainants.

GEO. H. CUTLER,
JAMES SILL,
Ex'rs.

And afterwards, to wit, on the 31st day of May in the year last aforesaid, the respondent, by their solicitors, filed in the office of the Clerk of the Court aforesaid, their special plea in bar, and their testimony taken under the order of the Court.

Which plea in bar is in the words and figures following, to wit:—

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The plea of the respondent in the above case to the relief prayed for in said bill.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in said complainant's bill of complaint mentioned, and contained, to be true in such sort, manner and form as the same are therein set forth for plea to the said bill and relief therein prayed, saith, that since the filing of the plaintiff's bill of complaint, and since the filing the answer thereto by the above named respondent, to wit: On the 22d day of April, 1856, an act was passed by the general assembly of the commonwealth of Pennsylvania, approved by the governor of the commonwealth, entitled "An act supplementary to the act incorporating the Erie and Northeast Railroad Company," by the provisions of which said act, among other things, it is provided, "that the Erie and Northeast Railroad, as originally located and constructed, be and the same is legalized and confirmed, and declared to be in full compliance with

the act of incorporation passed the 12th day of April, A. D. 1842, and the supplements thereto, anything in the said acts or omission to the contrary notwithstanding;" and further, the said act provided for the acceptance of the provisions thereof, by a vote of the stockholders of the said railroad company to be held for that purpose; which said meeting of the stockholders, pursuant to a call for that purpose, was held at the office of said railroad company on the 15th day of May, A. D. 1856 (inst.), in the city of Erie, at which time and place a majority of the stockholders representing a majority of the stock of said company, voted to accept the provisions of the said act of the 22d of April, A. D. 1856; and the said act further provided, that the governor should retain possession of the Erie and Notheast Railroad, under the act approved the 6th day of October, A. D. 1855, until the provisions of the act of 22d of April, A. D. 1856, should be accepted as aforesaid; and in the same act it was further provided, that all acts and parts of acts thereby altered and supplied, being in any way inconsistent therewith, should be and are thereby repealed. And the said defendant saith, that from and by the several provisions of the said act, reference being had to the same will more fully and at large appear, and the acceptance of the same by the complainants in this case, that the act of the 6th of October, 1855, entitled "An act to repeal the charter of the Erie and Northeast Railroad Company, and to provide for disposing of the same," was repealed, and is of no further force and effect whatever, and that the defendant is no longer in office, and legally entitled to the custody of the aforesaid Erie and Northeast Railroad, as he was entitled until the repeal of the act of October 6, A. D. 1855, as aforesaid, and the acceptance by the stockholders of the company of the provisions of the act of the 22d April, A. D. 1856, on the 15th May, A. D. 1856, as aforesaid.

Therefore, this defendant doth plead this Act of Assembly, entitled "An Act supplementary to the act incorporating the Erie and Northeast Railroad Company," passed the 22d day of April, A. D. 1856, and the acceptance of the provisions of the same, by a vote of the stockholders at the time and place aforesaid, in bar to the said complainant's bill of complaint, and prays the judgment of this honorable Court that he be hence dismissed, with his reasonable costs and charges in that behalf most wrongfully sustained.

I hereby certify, that in my opinion the above foregoing plea is well founded in point of law.

JAMES THOMPSON,
Att'y for Def't.

Dauphin County, ss:

Before me, the subscriber, a Justice of the Peace, personally came Joseph Casey, defendant in the above case, who, being duly sworn, saith that the above plea is not interposed for delay, and that ac-

cording to the best of his knowledge, belief and information, that the facts therein contained are true.

JOS. CASEY.

Sworn and subscribed the 31st May, 1856, *coram.*

C. A. SNYDER,
J. P.

An Act supplementary to the act, incorporating the Erie and Northeast Railroad Company.

Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That the Erie and Northeast Railroad, as originally located and constructed, be and the same is hereby legalized and confirmed, and declared to be in full compliance with their act of incorporation, passed the twelfth day of April, one thousand eight hundred and forty-two, and the supplement thereto, anything in said acts, or omissions to the contrary notwithstanding.

Section 2. That the said Erie and Northeast Railroad Company shall make such change or changes in the Buffalo Road, at Harbor Creek, between Miller's station and the Saw Mill built by Lane and others, as the road commissioners of Harbor Creek township may indicate, the said road commissioners being first requested to petition the Court of Quarter Sessions of Erie County, to appoint viewers, under the act of the 13th of June, one thousand eight hundred and thirty-six, entitled "An Act relating to highways and bridges," and the supplements thereto, to locate and open the said Buffalo Road where they desire a change in the same, the value of the lands taken and the damages done to the same to be ascertained and determined under the said act and its supplements, the cost thereof to be reimbursed to the said township by the Erie and Northeast Railroad Company, which said public road shall be constructed in a proper manner and within a reasonable time after the right to do so is established, and the said commissioners have for that purpose put the said railroad company in possession of the lands upon which the said public road shall be built; all disputes, if any shall arise, growing out of the construction of said road, to be determined by the courts of Erie County, as in other cases.

Section 3. That the said Erie and Northeast Railroad Company shall make the same or equal connections, and afford equal facilities to the Sunbury and Erie Railroad for the convenience of trade and travel as it makes with and affords to any other Railroad.

Section 4. That the Erie and Northeast Railroad Company shall, within six months after the passage of this act, construct a branch road, equal in all respects to the main line of their road, except in grades and curvature, to the harbor of Erie, at the depot grounds of the Sunbury and Erie Railroad, either by an independent road, or

in connection with any other road having the same terminus; and within three months after the passage of this act subscribe to the Pittsburg and Erie Railroad Company four hundred thousand dollars, to be paid at the discretion of the Erie and Northeast Railroad Company, in cash or in the coupon bonds of the said Erie and Northeast Railroad Company, bearing an interest of seven per centum per annum; or instead of such subscription, to locate, by such route as they may deem most practicable, and commence the construction of such portion of the main line of the Pittsburg and Erie Railroad, between the harbor of Erie and the coal-fields of Mercer county, as shall cost not less than four hundred thousand dollars, and complete the same within two years thereafter: *Provided*, The said four hundred thousand dollars shall be expended between the coal-fields of Mercer county and the line of the Lake Shore Railroad: And should the Erie and Northeast Railroad Company elect not to subscribe to the stock of the Pittsburg and Erie Railroad Company, but to construct a part of the road of said Company, as contemplated by this act, the Pittsburg and Erie Railroad Company may transfer to the said Erie and Northeast Railroad Company all the rights and privileges of the Pittsburg and Erie Railroad over that portion of the road so to be constructed; and should the Pittsburg and Erie Railroad Company refuse or neglect to make such transfer within three months, then and in that case, the Erie and Northeast Railroad Company shall have all the rights, privileges and franchises over that portion of the road so to be constructed, by any route between the aforesaid points that said Company may deem most advisable, that are now vested in the Pittsburg and Erie Railroad Company: The Governor shall retain possession of the Erie and Northeast Railroad under the act of the sixth day of October, one thousand eight hundred and fifty-five, until the provisions of this act shall have been accepted by a vote of the stockholders of the Erie and Northeast Railroad Company, called for that purpose: And for the purposes above mentioned, to construct a double track, and for other purposes, the Erie and Northeast Railroad Company is hereby authorized to issue not to exceed five hundred thousand dollars of coupon bonds, in amounts of not less than one hundred dollars each, bearing seven per centum interest, payable at such times and places as the said Company may determine; and the Directors may, if they deem it advisable, mortgage the said railroad and its appurtenances to secure the payment of the same; and any right of way or materials necessary to carry out this act, shall be acquired under the provisions of the act of the nineteenth of February, one thousand eight hundred and forty-nine, entitled "An Act regulating Railroad Companies:" The Legislature hereby reserve the right, in case the Company misuse or abuse any of its privileges, to alter, amend or annul the charter hereby restored, as well as all privileges hereby conferred, whenever the public interest may require the same, in such manner, however, as to do no injustice to the corporators:

And all acts, or parts of acts, hereby altered and supplied, or in any way inconsistent herewith, be and the same are hereby repealed.

Section 5. That all suits now pending, or hereafter to be brought by or against the said company, shall be tried in the county where the said railroad is located, as in case of individuals suing or being sued.

RICHARD L. WRIGHT,
Speaker of the House of Representatives.

WM. M. PIATT,
Speaker of the Senate.

Approved the twenty-second day of April, Anno Domini one thousand eight hundred and fifty-six.

JAMES POLLOCK.

Erie and Northeast Railroad Company.

Agreeably to public notice, a meeting of the stockholders of this company was held at their office in Erie, on Thursday the 15th inst., which was organized by appointing Geo. Palmer, Esq., chairman, and J. C. Spencer, secretary.

On motion, they then appointed tellers and proceeded to vote on the acceptance or rejection of the act of 22d April last, relative to this road.

There was 1645 votes for the acceptance of the bill, representing 7464 shares of stock, and 23 votes against the acceptance, representing 44 shares of Stock.

The following resolutions were also passed:—

Resolved, That the directors of this company be and are hereby requested to employ a competent engineer or engineers, to examine the two routes proposed for the Pittsburgh and Erie road, viz: The western leaving the Lake Shore road at the most proper point west of Girard, and the eastern, known as the Waterford route; and to ascertain as near as practicable, by the 8th of July next, the distance and grades, curvature and cost of each, and to employ an agent or agents for the purpose of receiving subscriptions to the stock of said road, and to ascertain on what conditions the right of way can be obtained upon each route. Also to appoint a committee to ascertain by which route the coal will be best developed, and further ascertain from the directors of the Sunbury and Erie Railroad Company, whether the interests of their own and the Pittsburgh and Erie road can be advanced by uniting the two roads for any distance, in case the eastern route shall ultimately be adopted by the latter company; and if so, to what extent and upon what conditions. And also, to ascertain from the Cleveland, P. & A. R. R. Co., what arrangement can be made for doing the business on their road, between Erie and the point of divergence, in case the western

route is adopted. Also, what arrangement can be made to connect the Erie & N. E. road with their branch to the harbor.

Resolved, That this meeting adjourn to the 8th of July next, in order to receive the report of the engineers and agents appointed to examine the routes proposed for the Pittsburg & Erie road, to obtain subscriptions, &c., for the purpose of determining by a vote of the stockholders, the route of said Pittsburg & Erie road, and to elect whether they will make a subscription of $400,000, or built a portion of said roads; if the latter, what portion, and any other matters connected with carrying out the provisions of the act this day accepted.

Resolved, That the secretary be requested to give public notice of said adjourned meeting in the same papers in which the call for the meeting this day was given.

GEORGE PALMER,
Chairman.

J. C. SPENCER,
Sec'y.

Which depositions of the respondents, are in the words and figures following, to wit:

IN THE SUPREME COURT OF PENNSYLVANIA,
Middle District.

THE ERIE AND NORTHEAST RAILROAD COMPANY
versus
JOSEPH CASEY.

In the Supreme Court, No. . . of . . . . term, 1855. In equity.

John H. Walker, Esq., *Attorney for Complainants:*

Take notice, that in pursuance of an order of the Supreme Court in this case, dated May 6, 1856, that testimony will be taken to be read in evidence on the hearing of this case, on behalf of the respondents, before George H. Cutler and James Sill, examiners, commencing at 2 o'clock P. M. of Thursday, the 22d day of May, 1856, at which time you may attend and cross-examine.

JAMES THOMPSON,
Attorney for Respondents.

May 22, 1856.

The return to the commission in above entitled cause, appears in certain schedules hereunto annexed.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

In compliance with the foregoing notice, the examiners met at the office of James Sill, in Erie, at 2 P. M., on the 22d of May, 1856,

when Hon. John H. Walker being present on behalf of the complainants, and Hon. James Thompson in behalf of respondents.

James Williams, produced by respondents, was sworn, and testified as follows:

I reside in Erie, Pa. I am fifty-six years of age, and manufacturer of boots and shoes.

Q. Were you a director of the Erie and Northeast Railroad Company when first organized? How long did you remain so? Was the road located and constructed in the borough of Erie, as enlarged in 1848, and in Harbor Creek township, while you were such director?

A. I was a director of that company when first organized. I was such until the road was located in Erie and Harbor Creek, but I am not certain as to whether I was in the board at the time the road was constructed over French Street, in Erie. I was a director when it was making and building through the town.

Q. State what the boundary of the borough was in 1842, and up to the extension of the same in 1848.

A. In 1842, the southern boundary of the borough was Twelfth Street, and I think it was extended in 1842 south. The eastern boundary was Parade Street, up to 1848. The western boundary in 1842 was Chesnut, and extended in 1848 to Liberty Street.

Q. What time was the road located in the *the* borough of Erie, and how far south of Twelfth Street was that location?

A. I think the survey was in 1849, and the time of location I cannot state exactly. I think it was in 1850. I think the location was sixty rods south of Twelfth Street.

Q. Were the company induced to make this location south of Twelfth Street by any act of the citizens or borough authorities of Erie, that you know of?

A. None that I know of. It was decided by the board on the recommendation of Mr. Courtwright, he being the chief engineer.

Q. Were you present when the chief engineer commenced surveying for the location of the road; and what was said to him, if anything, by yourself, about his not being within the borough, as it was prior to the act of 1848?

A. I was present when Mr. Courtwright, who had the management of the survey, commenced surveying for the location of the road. On the first morning that they started out to make the survey, I went along. There was Mr. Courtwright, James C. Reid, John S. Brown, and others. I went up for the purpose of seeing them commence. They commenced near the present railroad, between French and State Streets—nearer to State than French—north of what is now Penn Street. Mr. Courtwright directed James C. Reid to make a mark on the old beech tree which stood there, saying they might make a commencement there. I went to him and asked him why he commenced at that point, saying that I supposed that they would commence at the old Borough line, according to their charter. He replied that they must commence some place, and

they might as well commence there as any place else; that they were going to run two or three experimental lines, and that was the data to begin from.

Q. When the road was located, state, if you please, whether this tree that you speak of being marked at that time, was on or near the line of the road in the borough, as adopted.

A. It was a short distance north of the road as finally located.

Q. Was there, to your knowledge, any wish generally expressed by the people of Erie, that the location should be made in the then borough, where it was made, instead of running to the harbor?

A. No, not that I know of.

Q. State who were the directors of the road at that time besides yourself.

A. Charles M. Reed, William Kelly, Milton Courtright, A. W. Brewster, S. Jackson, and myself, with others I don't recollect.

Q. Do you know of any property held by either of those directors on the line of road in the borough, and at and near its terminus? State by whom, and to what extent, as near as you can.

A. Mr. Courtright owned ten acres on the south side of the present depot, which he bought from Mr. McNair. The lot on which the present depot stands was owned the one-half by Mr. Riddell's heirs, and the other half by Messrs. Tracy and Courtright. Mr. Brewster, with Messrs. Cadwell and McSparren, owned property near there, south of where McSparren's mill is. I owned at that time a lot northwest of the terminus and beyond.

Q. Do you remember when the Franklin Canal Company commenced surveying and locating their road, and whether that location was not made the same summer that the location of the Erie and Northeast road was made?

A. I don't remember exactly when it was done. The Franklin Canal Company's road was located after the Northeast road. I don't remember the date; I think it was in 1850.

Q. Was not the Franklin Canal Company's road located from a point at and near the depot ground of the Erie and Northeast road to the Ohio line; and was it not being constructed between those points, and partly finished, before the Erie and Northeast Railroad was completed; and when finished did it not, with the Erie and Northeast, Buffalo and State Line, and Cleveland, Painesville, and Ashtabula roads constitute a road passing by Erie to the State of Ohio and west?

A. The Franklin Company's road was located from a point near the depot ground of the Erie and Northeast road to the Ohio line—the road comes up to Sassafras Street. It was constructing between those points before the Northeast road was finished. With the roads mentioned in the question, they constitute a line of road as enquired of, being connecting links in the Lake Shore road.

2. Was there any road authorized to be constructed west from Erie to the Ohio State line at the time of the incorporation of the

Erie and Northeast Railroad, and was not the Erie and the Ohio State Line Railroad, incorporated in 1848, repealed in 1849?

A. There was none at the time of the incorporation of the Erie and Northeast road. There was a grant by the Legislature for that purpose in 1848, which was repealed afterwards in 1849—I think at the next Legislature.

Q. Did you know of any cuts or caricatures about the time of the location of the Erie and Northeast road in the borough, intended to induce a location south of Twelfth Street, in preference to a location to the harbor? Were any such made known to the Board while you were a member?

A. I know of none. None such were to my knowledge known to the Board while I was a member.

Q. Did the construction of the road upon and across the streets of the borough of Erie impede or obstruct their free use?

A. I consider they are an obstruction. I have always thought so.

Q. If the bridge over French Street be nine and a half or ten feet high, is that headway enough to admit of a free use of the street, particularly in hauling grain, hay, corn, or fodder?

A. I do not know whether it would be or not.

Cross-examined by Complainant's Counsel.

Q. Could a railroad be located through Erie, crossing the lots at right angles, as the Erie and Northeast Road does, that would obstruct the streets less than they are obstructed by the present road? If so, state where and how.

Answer. In going through the town, I do not know that it would. It would be less obstruction if it went down to the harbor. I do not know of any place up town that it would be less obstruction than where it now is.

Q. Did you not, on the 25th of May, 1850, as a director of the Erie and Northeast Company, second and vote for a resolution offered by William Kelley, a director of the road, locating the Erie and Northeast road on the ground where it is now built?

A. I do not know whether I seconded it or not. I voted for such a resolution at that time.

Q. At the time of the location of the road in Erie, referred to in the last question, was the right of the Erie and Northeast Company to locate their road where it was then located questioned by any director, member of the town council, citizen of Erie, or any body, on the ground that locating the road there was in violation of the act incorporating the company, because it was outside of the limits of the borough, as they existed in 1842?

A. I do not know of any protest being laid before the Board by anybody, or by the borough of Erie, on that ground; the borough authorities were not consulted, as far as I know. It was located on the recommendation of Mr. Courtright, the chief engineer.

Q. Did you, as a director of the Northeast Company, suppose

that in voting to locate the road where it was located you were doing an act in violation of the charter of the company?

A. I did not vote in view of doing an act in violation of the charter; that location was always considered, at that time, as a temporary location, and not as a permanent one. The design was eventually to go to the harbor. The fixtures that were to be placed upon the depot grounds were to be temporary; that was the intention at the time. The permanent fixtures were placed there after I left the Board, and all the property purchased, except the depot grounds, since I was in the Board. The depot ground was purchased because it could be obtained at that time at a low price.

Q. At the time you voted for the location of the Erie and Northeast Road where it is in Erie, did the thought occur to you or to any director of the Board, as far as you know, that in locating the road outside of the limits of the borough, as established in 1842, you were doing an act in violation of the charter?

A. I did not think so at the time, for the reason it was not considered a permanent location.

Q. Did you not own ten acres of land immediately west of Sassafras Street, and northwest of the terminus of the Erie and Northeast Road, and did that fact in the least influence your vote in locating the road where it was?

A. I owned five acres myself, and my brother and myself owned five acres more at that point, but I must say that it did not influence my vote.

Q. You state that the thought did not occur to you, in locating the road where it is located, you were violating the act of incorporation, because the location was not a permanent one. Did the thought occur to you at all, or was it spoken of among the directors, that the company had not the right, under its charter, to locate the road on that ground?

A. I do not think the right to locate the road there was talked of at all, or questioned.

Examination in chief resumed.

Q. Was it not known to you and the Board at the time of the location of the road, that the location was not in the borough, as it existed from 1842 to 1848?

A. We must have known it was not in the borough, but it was not talked of at the time. I must have known it.

Q. Did you know at that time where the borough lines were in 1842?

A. I did.

Cross-examined by Complainants.

Q. If at the time of the location you knew where the bounds of the borough were in 1842, did you not then suppose and believe that those lines were obliterated by the enlarged lines of the borough as

established by the act of 1848, if the question as to borough lines suggested itself to you at all?

A. I was not suggested or thought of to my knowledge. It did not occur to me at all at that time.

Question by Respondents.

Q. Did it not occur to you that it was necessary that the road should be located in the borough, as it existed in 1842 up to 1848, when you spoke to Mr. Courtright about commencing to survey near the beech tree south of it?

A. It did; and if it had been carried to the harbor it would then have been in the borough as it was in 1842, where it was expected to be carried at the time.

JAMES WILLIAMS.

Sworn and subscribed before us, May 22d, 1856,

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Sherburn Smith, Esqr., produced by respondents, was sworn and testified as follows:—

I reside at Erie. Am forty-six years of age, and a hatter by trade.

Q. How long have you resided in Erie, and were you here during the years 1849, 1850, '51, and '52?

A. I have resided here twenty-two years, and I was here in those years.

Q. Did you know of any general sentiment and expression of the people of Erie at the time of the location of the Erie and Northeast Railroad in the borough in favor of the location as made in preference to a location to the harbor?

A. I never heard a person express themselves in favor of that location as made; that is my recollection.

Q. Where did the people, as far as you know, wish and expect the road to be located at the Borough of Erie?

A. They wished it to go to the harbor.

Q. Did you know of any cuts or caricatures intended to induce a location up town, in preference to going to the harbor?

A. I knew of none. I never heard of any at that time.

Q. Did you at any time hear or know of any cut or caricature? Did you have any such in your possession? When was it and what was its object? Describe it.

A. I had one in my possession. I should think it was about 1852. It may have been in 1853. It was after the bridges were built over State and French Streets. The object was ridiculing the idea of a railroad running down State Street and to Mr. Reed's dock, by parties who preferred the road to go to the harbor farther east. It was

drawn with a pen, I think, or pencil. It may have been painted. It was the size of a page of cap. It was the profile of a railroad car propelled by a horse; a single car drawn by a horse down the street. It had also on it a steamboat, and represented the car unloading at Mr. Reed's steamboat. The object was to ridicule Reed's desire to get all the business.

Q. Did you ever know of or have in your possession any other caricature excepting the one you have described, or hear of any such in the community?

A. I never have.

Q. Do you know how the road crosses the streets of Erie? If so, state whether it obstructs their free use or not.

A. I know how it crosses those streets, and consider that it obstructs the most of the streets that it crosses very much. I think that one of them is rendered entirely impassable. I mean German Street.

Cross-examined by Complainants.

Q. Was German Street opened and turnpiked for travel by wagons when the railroad was located? and has it yet been opened and turnpiked for travel for one square, either north or south of the railroad? and if opened and turnpiked (or thrown up) as required at that point, would not the railroad cross it at or near grade?

A. I think it was opened and travelled at that point at the time the railroad was located, but not turnpiked. It has not been turnpiked, and not travelled, because of the railroad obstruction. It is impossible to pass it. My impression is, that if the street was graded the street would be about six or seven feet below the railroad.

Q. Could the railroad pass over the streets of Erie at any other point, and obstruct them less than it does where it now crosses? If so, state where.

A. This is a mere matter of opinion now. I think it could at almost any point north of it, for the reason that where it now runs Turnpike and Beach Streets run together just at the point where it crosses.

Cross-examination in Chief resumed.

Q. Are you a member of the City Councils, and do you know that the city have fixed a grade of the street you spoke of, and whether this enables you to answer how high the railroad would be above grade?

A. I am a member of the Common Council. A grade has been established for German Street by the City Engineer. That is the reason why I can speak of it. I recollect that we passed at one time in the Common Council a resolution to grade that street.

Cross-examination resumed.

Q. When was the grade of German Street established by the City of Erie?

established by the act of 1848, if the question as to borough lines suggested itself to you at all?

A. I was not suggested or thought of to my knowledge. It did not occur to me at all at that time.

Question by Respondents.

Q. Did it not occur to you that it was necessary that the road should be located in the borough, as it existed in 1842 up to 1848, when you spoke to Mr. Courtright about commencing to survey near the beech tree south of it?

A. It did; and if it had been carried to the harbor it would then have been in the borough as it was in 1842, where it was expected to be carried at the time.

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GEO. H. CUTLER,
JAMES SILL,
Examiners.

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I reside at Erie. Am forty-six years of age, and a hatter by trade.

Q. How long have you resided in Erie, and were you here during the years 1849, 1850, '51, and '52?

A. I have resided here twenty-two years, and I was here in those years.

Q. Did you know of any general sentiment and expression of the people of Erie at the time of the location of the Erie and Northeast Railroad in the borough in favor of the location as made in preference to a location to the harbor?

A. I never heard a person express themselves in favor of that location as made; that is my recollection.

Q. Where did the people, as far as you know, wish and expect the road to be located at the Borough of Erie?

A. They wished it to go to the harbor.

Q. Did you know of any cuts or caricatures intended to induce a location up town, in preference to going to the harbor?

A. I knew of none. I never heard of any at that time.

Q. Did you at any time hear or know of any cut or caricature? Did you have any such in your possession? When was it and what was its object? Describe it.

A. I had one in my possession. I should think it was about 1852. It may have been in 1853. It was after the bridges were built over State and French Streets. The object was ridiculing the idea of a railroad running down State Street and to Mr. Reed's dock, by parties who preferred the road to go to the harbor farther east. It was

drawn with a pen, I think, or pencil. It may have been painted. It was the size of a page of cap. It was the profile of a railroad car propelled by a horse; a single car drawn by a horse down the street. It had also on it a steamboat, and represented the car unloading at Mr. Reed's steamboat. The object was to ridicule Reed's desire to get all the business.

Q. Did you ever know of or have in your possession any other caricature excepting the one you have described, or hear of any such in the community?

A. I never have.

Q. Do you know how the road crosses the streets of Erie? If so, state whether it obstructs their free use or not.

A. I know how it crosses those streets, and consider that it obstructs the most of the streets that it crosses very much. I think that one of them is rendered entirely impassable. I mean German Street.

Cross-examined by Complainants.

Q. Was German Street opened and turnpiked for travel by wagons when the railroad was located? and has it yet been opened and turnpiked for travel for one square, either north or south of the railroad? and if opened and turnpiked (or thrown up) as required at that point, would not the railroad cross it at or near grade?

A. I think it was opened and travelled at that point at the time the railroad was located, but not turnpiked. It has not been turnpiked, and not travelled, because of the railroad obstruction. It is impossible to pass it. My impression is, that if the street was graded the street would be about six or seven feet below the railroad.

Q. Could the railroad pass over the streets of Erie at any other point, and obstruct them less than it does where it now crosses? If so, state where.

A. This is a mere matter of opinion now. I think it could at almost any point north of it, for the reason that where it now runs Turnpike and Beach Streets run together just at the point where it crosses.

Cross-examination in Chief resumed.

Q. Are you a member of the City Councils, and do you know that the city have fixed a grade of the street you spoke of, and whether this enables you to answer how high the railroad would be above grade?

A. I am a member of the Common Council. A grade has been established for German Street by the City Engineer. That is the reason why I can speak of it. I recollect that we passed at one time in the Common Council a resolution to grade that street.

Cross-examination resumed.

Q. When was the grade of German Street established by the City of Erie?

A. It was prior to my coming into the council. I could not say when.

Q. Was it not since the location of the Erie and Northeast Road, and since the difficulties between the City of Erie and the Northeast Road?

A. I do not know when the ordinance was passed to establish the grade, or when was it done. It was before I came into the council.

Q. Have you a distinct recollection of seeing the grade established by the City of Erie for German Street, where the railroad crosses it, and would that grade make the Erie and Northeast Road pass German Street at that point seven feet above the grade established by the city?

A. I have never seen the profile for the cutting at that point, but my recollection of the matter is that I was told by members of the council who had served before I came in, that the cutting on that street where the railroad crosses the street would be between three and four feet.

Direct Examination resumed.

Q. Which of the streets do you recollect this to be on?

A. It is either Holland or German Streets that I allude to.

S. SMITH.

Sworn and subscribed before us, May 22, 1856.

GEO. H. CUTLER,
JAS. SILL,
Examiners.

James D. Dunlap, produced by respondents, was sworn, and testified as follows:

I reside in Erie. My age is about forty-seven, and an attorney-at-law.

Q. Were you one of a committee of councils appointed in December, 1849, in regard to the crossing of the Erie and Northeast Road over State and French Streets?

A. I was on a committee of councils appointed in March, 1850, relating to the crossing of the railroad over French Street. I have no recollection of acting on that relating to State Street, and have no recollection of having been appointed on such committee, or having been notified of such appointment. As to French Street, I have a distinct recollection.

Q. State whether, at the time you were appointed, the railroad had not been previously located in the Borough of Erie, and whether any work had been done towards grading it.

A. I understood it to be located in the Borough of Erie; I think from J. C. Spencer; I may be mistaken as to time. They had either commenced or were about to commence work; I could not state. It was stated to the council and to the committee, to my re-

collection (I think by Mr. Spencer), that the grade of the Erie and Northeast Railroad would not make a good street, unless the street ran under the road. It was for the committee to determine whether the street should run under the road or run over it.

Q. Was any person present to show you the location of the road at that point, and who was it?

A. There was Irvin Camp.

Q. Were the city authorities, up to that time, consulted by the Railroad Company, as to where the location should be in the Borough of Erie?

A. Not that I know of. I think I was elected in March, 1849, and continued on in the borough council as long as it remained a borough, and was in the Common Council the first year that it was a city.

Q. Did you hear or know of any general expression among the people of Erie about the time of the location of the road, giving a preference to the location adopted over that of a route to the harbor, or was the expression the contrary?

A. I think the general expression was to the contrary, and in favor of going to the harbor.

Q. Did you know of or hear any general report of cuts or caricatures burlesquing the route to the harbor, and intended to produce the location of the road adopted in the Borough of Erie by the Railroad Company, about the time of the location of the road?

A. I never did. I was here in town at the time, but *but* never knew of any at any time, except the one that was referred to in Smith's testimony.

Cross-examination by Complainants.

Q. Did you not know, when the Railroad Company were making their surveys in Erie, preparatory to the location of the road, that they were making the same with the view of locating their road where it is; and did you, as a member of the council of Erie, or any of your associates, object to those surveys or that location, or signify to the company in any way that you, as a member of the council, disapproved of that location?

A. I did understand that they were making their surveys for a location there for a temporary purpose. I did not then signify to the company that I disapproved of that location, nor do I know of any other of the council doing so. It was represented to me by a member or members of the board, that they designed running to the harbor as soon as they could get sufficient means to do so.

Q. Was it represented to you by any member of the company that it was the intention of the company to run their road to the harbor, and abandon the bridges and entire road as constructed, or continue the same, diverging at some point to the harbor, when they were in funds to do so?

A. I understood from Wilson King that the company would un-

doubtedly diverge from the east part of the town to the dock, as soon as they could get money to do so. I did not hear any one say that they intended to abandon the road up town, but that the depot and fixtures up there were designed to be temporary.

Examination in chief resumed.

Q. State whether these representations were the reasons why, in your opinion, that no interference with the company took place in regard to their location in the borough, by the borough authorities.

A. I think those were the reasons.

Cross-examination resumed.

Q. Did you hear any member of the council, or any other person, say that was the reason why the authorities of Erie did not interfere to prevent the company from locating their road where it is?

A. I don't know that I did, but it was what influenced myself.

Q. When did you first learn that the location up town was to be but temporary?

A. I heard it first in 1849 or 1850, and I think I heard it by Mr. King about the time the application was made to run down State Street—I think it was about that time.

Q. Did you not as a member of the council vote in favor of the application made by the company to run their road down State Street to the harbor, as the means by which the road of the company was to be continued to the harbor, and their depot and other buildings established there?

A. I believe I voted for it with restrictions and the right to repeal. I don't recollect that there was anything said about depot buildings. I still understood that this road down State Street was to be temporary, till they could get more means to go more directly to the dock, diverging off from the line of the road east of the town. It was always alleged that it was the want of means that caused them to locate up town and not go to the dock. I think I heard it from Mr. King and Mr. Kelly.

JAMES D. DUNLAP.

Sworn and subscribed before us, May 22, 1856.

GEO. H. CUTLER,
JAS. SILL,
Examiners.

At 7 P. M. examiners adjourned until Friday 23d, at 9 A. M.

JAS. SILL,
Examiner.

Friday, May 23d, at 9 A. M., examination proceeded, when Rudy Shank, produced by respondents, was sworn, and testified as follows:—

I reside in Mill Creek. I am seventy-five years of age and past, and a farmer.

Q. Had you a conversation with General Reed (and was he not president of the company at the time?) at any time after the location of the Erie and Northeast road, about the right of way across your farm; if so, what did he say about the location of the road up town, and about the intention of the company to run it to the harbor?

(Complainants object to the declarations of Mr. Reed, because he has not been examined by the complainants, and might be, if desired by respondents, being in town, and not being now a director.)

A. I had a conversation with General Reed, who was president of the company at the time, as to the right of way across my farm. It was after the location of the road, and shortly after they had gone to work. I was not willing to let them go through, and Mr. Reed sent word to me that I should come in and see him. I came in and found out what he wanted. He said he wanted to try and compromise about that railroad, and asked me what I would ask. I told him I would not have asked anything if it had went on the line of the tract. He then told me that I need not expect very much damage, because the road ought to have gone to the dock in the start, and he would engage me that it would go there before five or six years.

Q. Does the road run through or along the line of farms going east from the out-lots, and how far? Through whose farms does it run?

A. To the best of my knowledge it does not. It cuts off about thirty-five rods of my farm, and I think the same of Whitley's and of Riblets'. It runs through Cunningham's and Crisley Ebersoles, and Dreisigacher's and Blackwood's, which is next to the Four Mile Creek.

Q. How long have you lived in Mill Creek Township?

A. About twenty-nine years.

RUDY SHANK.

Sworn and subscribed before us, May 23d, 1856.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Wilson King, produced by respondents, was sworn, and testified as follows:—

I reside in Erie; am fifty years of age. I have been a civil engineer, contractor on public works and other pursuits mingled in with it.

Q. In what capacity were you connected or employed in the Erie and Northeast Railroad Company? If in different ones, state how long and what they were?

A. In the spring of 1849, I purchased the interest of Henry Cadwell, which I understood to be one-ninth of the stock of the Erie

and Northeast Railroad Company. Mr. Cadwell had been a director in the company. He resigned his directorship, and the company, at their next meeting, appointed me to fill the vacancy. I remained a director until the summer or fall of 1852, when I resigned. I was appointed an assistant by Mr. Courtright (who was chief engineer), at the beginning of the exploring surveys. I participated in the preliminary surveys, and in determining fixing the location of the road. The absolute location was made by Mr. Camp (who was the successor of Mr. Courtright), under the direction of the Board of Directors. I was early appointed on a committee to procure the right of way, and sometimes acted alone in procuring the right of way.

Q. How far south of the limits of the old borough was the road located in town, and how far from the harbor?

A. I think it was located sixty rods south of the southern limits of the borough before it was enlarged, about a mile and a quarter from the southern edge of the harbor; about a mile and a half from the steamboat landing at the docks.

Q. What distance into the harbor did the borough limits at that time extend, and if the railroad had been located to the harbor, would it not in that event have come to and into the old borough, as it existed in 1842?

A. The limits extended some fourteen hundred feet north of the north line of Front Street (about a quarter of a mile), and a location to the canal basin or to any place at the docks, or a little north of the docks, would have been within the limits of the borough, as they were in 1842.

Q. Was there any engineering or topographical difficulty in locating and constructing the road to the harbor, or objection other than that it would cost more than to its western terminus, as located?

A. There was not any except higher grade in descending to the lake. The present depot is about one hundred and ten feet above the level of the lake. There was no difficulty in diverging a mile and one half east of Erie and reaching the harbor, except the increased expense and a steeper grade than the balance of the road. Grades could have been obtained that could be worked advantageously with locomotive power, but not such as that the same power could take a load from the harbor as large as they could take on the balance of the road.

Q. How long after the location of the Erie and Northeast Railroad before the Franklin Canal Company began to make preparations for a construction of their road from Erie west to the Ohio line, and at what point did they terminate in Erie?

A. They commenced their surveys in the summer or fall of 1849, and I think completed their location in 1850, terminating at the west end of the Erie and Northeast Railroad depot grounds. The Erie and Northeast Road was completed and prepared for the passage of cars in January, 1852. The Western Road was completed in the fall

of 1852 or 1853; my memory is not distinct about it, as to which; I think it was in October or November or December, 1852.

Q. Did you know of any general public sentiment in favor of the location and terminus of the Erie and Northeast road in town where it was located, in preference to a location at the harbor? State your knowledge on this subject.

A. I did not. My knowledge is that the Board of Directors were clamorously called upon by many of the people to locate it at the harbor or public square, or at different points further north than where the location now is. Some favored a location on a lot of Mr. Reed's on Tenth Street, where Mr. Reed was inclined to carry it, but the strongest appeal was to carry it to the harbor. The Board of Directors discussed the question frequently in their meetings, and answered the people that they had not capital or means to build the road to the harbor at that time, but as soon as they could themselves, or with any other company or companies coming in from the east, or west, or south, they would diverge east of Erie, and make a good road to the harbor.

Q. Did you know of any cuts or caricatures in existence about the time of the location of the road, calculated to prevent a location at the harbor, and to procure the location that was finally adopted? If so, was any such known to the Board?

A. I did not know of any, or do not remember them.

Q. Do you remember of hearing any such generally talked about in town?

A. I do not.

Q. How many of the directors at the time of the location of the road were citizens of the borough of Erie; and state if most of them had not been citizens for some years?

A. The directors were all citizens of the borough at the time of the location, and had been for many years. During the construction of the road one director was elected from Northeast, one of the directors from Erie resigning, and the vacancy was filled by a new election.

Q. What was the southern boundary of the borough previous to its change in 1848; and how long had it been the boundary previously thereto?

A. The southern boundary was the south line of Twelfth Street, and had been since the organization of the borough.

Cross-examined by Complainants.

Q. When were you appointed a director of the Erie and Northeast road; and had not the road been located before your appointment?

A. I think I was appointed in April, 1849, the same month that the survey commenced, though my appointment as a director may have been a month later. I know I was appointed a director before we closed the location.

Q. Was not the road finally located in Erie the 25th of May,

1849; and were you not appointed a director after that, and more than a month thereafter?

A. The preliminary surveys of the road were commenced in April, 1849. The final location was made by Mr. Camp, having been detained for want of a transit instrument; I think it was not completed until July or August, 1849, and I was a director before that time, and also a contractor for the construction of a portion of the road.

Q. During the preliminary surveys at or about the time of the location of the Northeast road in the borough of Erie, was the right of the Company to locate its road in Erie, where it is, questioned by any engineer, director of the Company, member of the Council of Erie, or by anybody, as not justified by, but a violation of the charter of the Company, because the location was outside the limits of the borough as it existed in 1842? If questioned by any one, state who.

A. Not to my knowledge.

Q. Did you at the time alluded to in the previous question, hear the limits of the borough as it existed in 1842, spoken of in connection with the location of the road?

A. I did not.

Direct Examination resumed.

Q. Do you mean to say that the route was not fixed until the final location, or was it fixed before by the board?

A. It was generally fixed; but not final until the jury had acted upon the question of right of way.

Q. State whether you met and consulted with the board prior to your election as a director.

A. I think I did, frequently. I recollect distinctly of being a director and upon a committee of the directors that accompanied the jury upon the right of way, and the location was not fixed anywhere until after the jury had assessed damages for the right of way. There may have been a route recommended, or a resolution in favor of one, but the location was not fixed until July or August, 1849, or later still.

WILSON KING.

Sworn to and subscribed before us, May 23, 1856.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

John S. Carter, produced by respondents, was affirmed, and testified as follows:

I reside in Erie. I am forty-eight years of age, and a druggist, and have lived in Erie nineteen years last September.

Q. Did you know about the time of the location of the Erie and Northeast Railroad in the borough, of there being any general public

sentiment in favor of the location where it was determined upon, in preference to going to the harbor.

A. I did not. I think if there had been any excitement I would have known of it. I don't remember of anything being said about it.

Q. State, as far as you know, whether the wish of the public generally was not that the road should be taken to the harbor?

A. I don't know that I could say anything more distinct about that than I could about the other.

Q. Did you hear or know of any caricatures circulated about the time of the location of the road, calculated to effect an up town location? Did you hear of any such about that time or period?

A. I did not.

Q. Do you know the location and construction of the road across the streets of the borough? If so, state whether it obstructs the free use of the streets.

A. I do know of it. It does obstruct the free use of the streets. It makes me drive around; at any rate, when I go up in that part of the town, I avoid French, State, and Beach Streets when driving.

Cross-examined by Complainants.

Q. Could the railroad be located across the streets of Erie at any other point up town, and obstruct them less than where the road is located; and, if so, at what point?

A. It could not further north than where it now is, but might further south; but don't state positively that it could further south.

Q. Why do you avoid French and State Streets as mentioned, as the railroad crosses those streets on bridges?

A. I avoid those three streets in particular, because there are always more or less bustle there, and cars frequently crossing, being near the depot.

Direct Examination resumed.

Q. If the road had been located at the harbor, would it not have obstructed the streets less?

A. I think it would, as a matter of course. This would, of course, depend upon where it came in. If it had come in east of the town, and struck the lake below the town, it would have obstructed the streets less.

Cross-examination resumed.

Q. If the railroad had come in from the east to the harbor, and run west to Sassafras Street, its present terminus, would it not have crossed all the north and south streets that it now crosses? And when you say that running the road to the harbor, as you have stated, it would obstruct the streets less than on its present location, do you not only mean that the travel between the town and country would not have to pass over it?

A. That is partly so and partly not. If it came in east and to

the harbor, and along to Sassafras Street, it would cross the streets in the water, but not obstruct travel. I do mean that if it crossed the streets in the harbor, the diminished obstruction would be because it would not obstruct the travel between the town and country.

Q. At or about the time of the location of the Erie and Northeast Road, did you hear anything said about the limits of the borough, as it existed in 1842, or as they were subsequently enlarged in 1848, connected with the location of the Northeast Road?

A. Not that I remember of.

JOHN S. CARTER.

Affirmed and subscribed before us, May 23, 1856.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 12 M. adjourned until 2 P. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 2 P. M., examiners met, when Ira Sherwin, produced by respondents, was sworn and testified as follows:—

I reside in Harbor Creek; am fifty-nine years of age, and have been a practising physician for the last thirty-five years. I have been a citizen of Harbor Creek, I think, thirty years.

Q. Were you acquainted with the original location of the Erie and Southeast Road in Harbor Creek, and if so how much of the Buffalo Road, in said township, was exclusively occupied by that railroad?

A. I was acquainted with the original location of that road in Harbor Creek. Where the present crossing is, between Wagner's and Mills', I should judge that it interfered with the Buffalo Road between fifty and sixty rods. This would be my impression; I think I have measured it once, but have forgotten the distance. On the road between Gilbert and Flora Elliott's, I should judge the railroad interfered with the Buffalo Road about the same distance. Then it left the road and afterwards crossed it again. I measured it once, but have forgotten the distance. Between Andrew Elliott's and Stillman's it crossed the road again, but not for so long a distance. I should think that there it interfered with the public roads about forty rods. It may be a little shorter. I should judge that the whole distance was about one hundred and thirty or one hundred and forty rods altogether.

Q. State whether or not, from the manner in which the railroad crossed the Buffalo Road, it was or not an obstruction to its free use as a public highway, in the township of Harbor Creek.

A. The Buffalo Road could not be travelled with teams after the

railroad was built. I consider it an obstruction. There were three places at which it crossed the Buffalo Road. At two of them it took the whole road and made another road. It was at these two last places that it could not be travelled with teams.

Q. State whether or not it was dangerous travelling the Buffalo Road with teams in the vicinity of where the railroad crossed and occupied it.

A. I considered it very dangerous to travel the road that was made alongside of the Buffalo Road, by the railroad company. There were several serious accidents happened to my knowledge; cases which I was called to see. They occurred in consequence of the frightening of horses by the running of the cars.

Q. From your knowledge of the place where the railroad crosses between Mills' and Wagner's, and the manner of its crossing the Buffalo Road, state whether it is an obstruction, and to what extent it is an obstruction to the said road?

A. I consider it an obstruction to the travel on the road. As to the extent or degree of the obstruction to people travelling in wagons, it was difficult to get out of the way of the cars. Mills' house obstructed the view of the approaching cars. People travelling west could not see the cars a great way, because of Mills' house. They were liable to meet on the crossing. The same difficulty would be had by the people travelling east, by the view being obstructed by Wagoner's barn.

Cross-examined by Complainants.

Q. You say that the Northeast Railroad occupies between fifty and sixty rods of the Buffalo Road, where it crosses it between Wagner's and Mills'. Do you not mean that that is the distance between cattle guard and cattle guard, on the railroad?

A. What I mean is the distance that the four rods in width of the railroad laps on to, or interferes with the Buffalo Road.

Q. Does the superstructure of the railroad occupy or interfere with more than three hundred and thirty feet of the Buffalo road in crossing at that point?

A. I should think it would. I think it did then, but could not state the distance. It is possible I may be mistaken, but I should think it did.

Q. Did not the railroad cross the Buffalo road at that point, at or near grade?

A. When the railroad commenced to interfere with the Buffalo road, it was a little above grade. Where it left it, it was a little below grade. Where the teams crossed it, it was about at grade.

Q. Could the railroad have crossed the Buffalo road at that point in the line run, and obstruct it less than it did?

A. As the line was run I don't think it could.

Q. Did not the company purchase land and construct or open a public road in place of the old Buffalo road, occupied by the railroad

near the Elliott's, and was not that a straighter and better road than the old one?

A. As to the purchase of land, I know nothing about it. They built a road on the north side of the railroad, which was straighter than the original Buffalo road along side for ninety rods; it may be one hundred rods. There was a crook in the Buffalo road, and that was the occasion of the railroad crossing it twice in that short distance, and the new road was straighter.

Re-examined by Respondents.

Q. Did not the oblique manner in which the railroad occupied and crossed the Buffalo road render the Buffalo road useless for purposes of public travel with teams, a greater distance than that merely occupied by the superstructure of the railroad?

A. It did. There were ditches on both sides of the road. On the road coming from the west the embankment of the railroad was higher than the Buffalo road, and obstructed the water. The more oblique a road is the more danger there is in crossing.

Q. From the oblique manner in which the railroad crossed the Buffalo road, did not the superstructure of the railroad itself furnish a serious obstruction to the passing and re-passing of loaded teams?

A. Of course it was an obstruction to the free use of the Buffalo road.

Q. From your knowledge of the topography of the country, could a line be run by the Erie and Northeast Company for their road which would cross the Buffalo road at such point and in such manner as would be a less obstruction, and produce less inconvenience to the people of that township, than the one adopted by that company?

A. I think it might be run where it would be less obstruction to the Buffalo road.

Cross-examination resumed by Complainants.

Q. Are you a civil engineer?

A. Not professionally.

Q. Where would you locate the Erie and Northeast Road so as to cross the Buffalo road on a better grade than where it was crossed (at Mills' I mean)?

A. Taking grade into consideration exclusively, I don't know that it could cross at a better place, but it could cross more at right angles with as good grade, it would be my impression.

Q. Have not the difficulties you have mentioned of loaded teams crossing at this point, on account of the acute angle at which the Buffalo road is there crossed, been removed by the railroad as re-located and constructed under the decrees of the Supreme Court of the State?

A. In a slight degree. If the road had crossed or been made where the Supreme Judges supposed it was, it would have removed the difficulties more than they are removed.

Question by Respondent.

You say you are not professionally a civil engineer; state if you are not somewhat acquainted with the business.

A. I will state that in my younger days I studied the art of surveying, and have practised it somewhat.

Q. If the Erie and Northeast Railroad, by a line running to the harbor of Erie, at as easy grades as would enable the road to reach that point, would it not have obviated much of the difficulty arising from the obstruction of the Buffalo road in the township of Harbor Creek?

A. It is my impression, from my knowledge of the lay of the land from Erie harbor to the State line, that the road might have been located entirely north of the Buffalo road all the way.

IRA SHERWIN.

Sworn to and subscribed before us May 23, 1856.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Philip D. Bryant, produced by respondents, was affirmed, and testified as follows:

I reside in Harbor Creek. I am forty-two years of age, and a farmer. I have resided in Harbor Creek fifteen years.

Q. Were you road commissioner of Harbor Creek at the time of the location and construction of the Erie and Northeast road?

A. I was.

Q. State if the road commissioners of Harbor Creek township at that time protested against the action of the Erie and Northeast railroad company as to their action in locating and constructing their road upon and across the Buffalo road in the manner they did in that township.

A. They did.

Q. State whether you furnished a copy of a protest herewith handed to you, on the company.

A. I served a copy on Giles Sanford, at that time secretary and treasurer of the company; which is appended to my testimony as "Exhibit A," and signed by the Examiners and myself.

Q. From your knowledge of the manner in which the Erie and Northeast railroad crossed the Buffalo road, was the free use of the latter road obstructed?

A. It was.

Cross-examined by Complainants.

Q. Could the railroad have crossed the Buffalo road at Mills' in the line it run, and obstructed it less than it did?

A. No.

Q. Did not the company construct a public road, to supply where it was interfered with by the railroad at the other points in that township, straighter than the old road?

A. They constructed a road, but it was not a public road. It was never authorized by any public officer of Harbor Creek township. It was straighter than the old road, but immediately along side of the railroad, which rendered it hazardous to travel.

Q. Was it not from the completion of the road in January, 1852, until the 27th of December, 1853, and for some time thereafter, used and travelled upon by those who travelled east and west upon the Buffalo road at that point?

A. I have no precise knowledge of the dates of the completion, or of the disturbance on the railroad. It was travelled when the embankment was raised on the old Buffalo road, until it was taken down by the decree of the Supreme Court, from necessity.

Examination resumed by Respondents.

Q. Did not the construction of this new road parallel with and contiguous to the railroad, very much impair its usefulness as a road for travel, and was it not a subject of general complaint on the part of the people of that township; and was it not submitted to by the people only from the necessity of the case, and on account of their unwillingness to do anything which might be construed into a violation of the law?

A. As to the above question, I answer in the affirmative unhesitatingly to all of it, except that I am ignorant of the sentiments or views of the people as to a violation of the law.

Cross-examination resumed by Complainants.

Q. Was not the Buffalo road constructed by the company in Harbor Creek, safer to be travelled upon than if the company had graded the old Buffalo road, as crossed by the railroad, so that those travelling the Buffalo road could have passed thereon?

A. I would say it was safer to travel, because it was off the track, whereas the other would have been on the track.

Question by Respondents.

Was not much of the difficulty arising from the railroad crossing the Buffalo road, produced by the oblique manner in which it crossed?

A. I would say that a majority of the difficulty is occasioned by the straight line. It has brought it very obliquely to the Buffalo road the whole way.

PHILIP D. BRYANT.

Affirmed and subscribed before us, May 23d, 1856.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

John R. Cochran, produced by respondents, was affirmed, and testified as follows:

I reside in Erie. Am forty-three years of age, and am now an exchange broker.

Q. Did you reside in Erie at the time of the location of the Erie and Northeast Railroad in the borough? If so, state whether there was any general sentiment or wish of the people expressed in favor of the up town location of the road in preference to going to the harbor. Was not the contrary the case?

A. I resided in Erie at that time—since September, 1842. I have no knowledge, nor heard of any general sentiment in favor of locating the road up town in preference to going to the harbor. The contrary was the case.

Q. Did you, about the time of the location of the road, know or hear of any caricatures or cuts calculated to burlesque the carrying of the road to the harbor about the time of the location?

A. I never did. I never heard the thing mentioned until within the last three days.

Q. From your knowledge of the manner in which the railroad is constructed across the streets and used, does it not obstruct the free use of the streets?

A. It does undoubtedly.

Q. State, if you know, to what extent Penn Street was occupied and obstructed by the railroad.

A. I would say it occupies that entire street. It closes it up and excludes travel.

Cross-examined by Complainants.

Q. Could the railroad cross the streets of Erie up town and obstruct them less than they are obstructed where the railroad now crosses? If so, state where.

A. I don't know that it could; don't know where they could find a place that would obstruct the streets less. The travel comes in from the south.

Q. During the preliminary surveys, at or about the time of the location of the road, or during its construction, did you hear any one question the right of the company to locate its road outside of the limits of the borough, as they existed in 1842, and within its bounds as they existed by the act of 1848, on the ground that *that* location would conflict with the chartered rights of the company?

A. My recollection is not good as to that. I could not say whether that point was raised or not. I know that there was a considerable controversy about the place where the road should be located.

Q. Have you any recollection of that point being raised?

A. I have not. J. R. COCHRAN.

Affirmed and subscribed before us, May 23d, 1856.

GEORGE H. CUTLER,
JAMES SILL,
Examiners.

Gideon H. Wagner, produced by respondents, was sworn, and testified as follows:

I reside in Harbor Creek. I am forty-four years of age, and have lived in that town five years last April.

Q. What extent of the Buffalo road in Harbor Creek Township did the Erie and Northeast Railroad occupy exclusively, in their original location and construction?

A. They occupied some seventy or eighty rods.

Q. What was the length of the crossing of the road (near where you reside) by the railroad, and state whether that is west of the portion exclusively occupied by them?

A. Some fifty or fifty-two rods. A portion of it was on the road (within fifty feet of the public road). It is west of the portion exclusively occupied by them.

Q. Was the public road in Harbor Creek Township impeded, and its free use obstructed by reason of the occupancy of it by the railroad?

A. Yes, the travel was impeded. On the eighty rods they could not travel at all.

Cross-examined by Complainants.

Q. Did not the Northeast Company purchase land for and construct a public road thereon, instead of the place of the seventy or eighty rods that you say was exclusively occupied by the railroad, and was not that a straighter road than the piece supplied?

A. I understood they did. There was a road built there beside the Buffalo road. It shortened the angles that existed in the old road supplied.

Q. You say that the railroad occupies from fifty to fifty-two rods in crossing the Buffalo Road where you lived; state whether you do not wish to be understood from cattle guard to cattle guard. Do you mean to say that the railroad occupies over three hundred and fifty feet in the bed of the travelled portion of the Buffalo Road, by its superstructure?

A. I do mean from cattle guard to cattle guard. I don't think the superstructure does occupy so much as the fifty-two rods. I should think it was somewhere about three hundred and thirty feet, or it may be over; I could not say positively.

Q. Did not the railroad cross the Buffalo Road at that point, at or about grade?

A. It did.

Direct Examination resumed.

Q. Did not the manner and extent of the crossing there materially obstruct the travel on the road?

A. Yes.

Cross-examination resumed.

Q. Could the railroad have crossed the Buffalo Road at that point, and have obstructed it less than it did?

A. No, I don't think it could.

Direct Examination resumed.

Q. If it had crossed at shorter angles, would it have not obstructed it less, and does it not obstruct it less since the change made in 1854?

A. It would have obstructed it less at shorter angles. The railroad obstructs it less a good deal, since the change made in 1854.

G. H. WAGNER.

Sworn and subscribed before us, May 23, 1856.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

B. B. Vincent, produced by respondents, was sworn, and testified as follows:—

I reside in Erie; I am fifty-two years of age and an iron founder, and have been a canal engineer.

Q. State if you were in Erie at and about the time of the location of the Erie and Northeast Railroad, and whether there was any public sentiment, to your knowledge, expressed in favor of an up-town location in preference to a termination at the harbor.

A. I was in Erie at the time of the location of the Erie and Northeast Railroad. How far it could be called a public sentiment I don't know. I had frequent conversations with the gentlemen then composing the Board of Directors, relative to the propriety of the up-town location or one to the harbor. By most of them it was conceded that it ought to be made to the harbor, but they had not the means at the command of the company to pay the expense of making it there, but when connections were made with roads running east and west a road would undoubtedly be made to the dock. There was, I think, the year following the location, a good deal of discussion about the propriety of carrying the road to the harbor, and it was objected to by men then connected with the Franklin Railroad interest, on the ground that it would prevent a railroad connection along the Lake Shore. There was a considerable discussion, as above stated. So far as I remember, I don't think there was much public sentiment about it; I don't think that there was a great deal of discussion with the public about it.

Q. Did you know or hear of any cuts or caricatures about the time the railroad was located, or while constructing, burlesquing the carrying of the road to the harbor?

A. I never did hear of anything of the kind until to-day.

Q. Do you know the manner in which the road crossed the streets of Erie and occupied Penn Street? If so, state whether the free use of the streets was impeded or obstructed by the road, in your opinion?

A. I know the manner in which the road crossed the streets of Erie, and occupied Penn Street. The track occupies Penn Street a part of the way from Peach Street westwardly. It obstructs that street very considerably as far as it occupies the street, though teams can cross on the track when not occupied by the locomotive cars. At the crossing of Peach and Turnpike Streets the railroad was located and constructed on Peach and Turnpike Streets, so as to be as little damage as possible for any railroad. The manner of using or occupying the road is very objectionable, and renders it a great nuisance to the travel. The bridge, as originally constructed across State Street was very narrow between the pents, yet it was as wide as the plank road was. The bridge on French Street was very low. I measured it once and think the distance between the underside of the sleepers and the ground as it then was, was between nine and ten feet; I think nine and a half feet. It was an obstruction for high loads of hay, or anything of that kind; high loads might be obstructed.

Cross-examined by Complainants.

Q. Could the Erie and Northeast Railroad cross the streets of Erie up town and obstruct them less than where they are crossed by that road? and if so, state where.

A. As I stated before, I think the crossing of the streets there as little objectionable as it could be anywhere up town, unless there were a change of grade.

Q. Where could it cross them and be a less obstruction with a change of grade?

A. At any point north of that, between that and the end of Turnpike Street.

Q. About the time of the location of the road did you hear the right of the company to locate it where it is questioned, on the ground that that location was a violation of the charter of the company?

A. I can't say at what period—how soon after the location I heard that question first suggested, but I think it was within a year.

Q. Who did you hear question it?

A. I don't remember; it was a subject of conversation frequently in conversations of the citizens, but I don't remember whom or where. I can't detail that.

B. B. VINCENT.

Sworn and subscribed before us, May 23, 1856,

GEO. H. CUTLER,
JAS. SILL,
Examiners.

At 6½ examiners adjourned until Saturday, May 24, at 9 A. M.

GEO. H. CUTLER, and
JAMES SILL,
Examiners.

At 9 A. M., May 24, 1856, examiners met, when the parties being present by counsel, Dr. Peter Faulkner, produced by respondents, was sworn, and testified as follows:—

I reside in Erie. I am 62 years of age, and a physician.

Q. Were you in Erie at and about the time of the location and construction of the Erie and Northeast Railroad in the town; and was there, to your knowledge, any public sentiment, generally expressed, in favor of an up-town location, in preference to one at the harbor; or was the expression (if there was any) in favor of location at the harbor?

A. I was in Erie at that time. I think there was no public sentiment in favor of an up-town location, in preference to one at the harbor. The expression was in favor of a location at the harbor. I mean that the bulk—the mass, the great majority—were in favor of going to the harbor.

Q. Did you know or hear, about that time, of any cuts or caricatures ridiculing the idea of a location at the harbor?

A. I have no recollection of seeing any of those cuts or caricatures. I recollect of hearing something about that, but I have no recollection of seeing it. I have heard people talk about it of late, that Mr. Reed was caricatured at that time, because he wanted the road continued around the town from the present depot to his dock. I have heard little groups talking about it, but I remember nothing at the time of the location. This that I have spoken of was some time after the location of the road. I have heard more of it within the last year, than at any other time; and never, except in connection with Mr. Reed, and going to his dock.

Q. Does your business, as a physician and surgeon, require you to cross the railroad track frequently? If so, state whether the construction of the road, as it crossed the streets of Erie, obstructs or impedes the free use of the streets.

A. My business does require me to cross the railroad track frequently. The construction of the road does impede the free use of the streets very much.

Cross-examined by Complainants.

Q. Could the Erie and Northeast Railroad cross the streets alluded to up-town and obstruct them less than where it crosses? And if so, state where.

A. My honest opinion is, that it could not. I think the main trouble arises from switching cars back and forth across the streets. I think there would be less trouble if there was one track across the

streets, and the cars ran right through without stopping on the streets.

Cross-question by Respondents.

Q. State, if you please, how the streets near the depot have been heretofore used by the Erie and Northeast Railroad, back as far as 1854, and whether that use obstructed the travel.

A. The crossing of two or three streets up there have been used for the making up of trains and the standing on of cars.

P. FAULKNER.

Sworn to and subscribed before us, this 24th of May, 1856.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Samuel H. Metcalf produced by respondents was sworn and testified as follows:

I reside in Erie, I am about forty-two years of age, and I am a clerk at the present time.

Q. State if you know the location of the Erie and Northeast Railroad across the streets of Erie. State any knowledge you have of the amount of obstruction by crossing Peach and Turnpike streets in 1854?

A. I am acquainted with the location of the road. In March, 1854, the 23d and 24th of March, 1854. The locomotive crossed on the 23d, one hundred and twenty-eight times; on the 24th, one hundred and forty-seven times, or about that number of times. The first day it was between the hours of eight in the morning and six in the evening. The second day it was between the hours of six in the morning and five in the evening.

About one-third of the times that the locomotive crossed, there were cars attached to the engine.

Q. Do you consider the manner in which the road crossed the streets, other than what you have described an obstruction to their free use?

A. I do consider it an obstruction, as it was in 1854, and has been continued.

Cross-examined by Complainants.

Q. In what does that obstruction consist? Is it in the super-structure or in the running of the road?

A. It consists in the frequent passing of the locomotive across those streets. That is what I consider the obstruction.

Q. Could the railroad pass over the streets alluded to up-town, and obstruct them less than where it passes them, and if so, where?

A. I think it could. Almost any where than where the old track is.

Q. Does not the railroad pass over all the streets in Erie that it passes, at or as near grade as it could pass them at any other point up town? If not so, state where it could pass them nearer grade than where it is located?

A. I think it does pass them all nearly at grade, except on the bridges across French and State streets. I don't know whether the grades of all the streets are set or not. I know that where the streets are graded, the railroad is near the grade. I think near Twelfth street would be as near grade as the old road now is. I have no knowledge that it could any where pass nearer grade than it now is. My reasons for thinking it would be a less obstruction on Twelfth street than where it now is, are these: It is because Turnpike and Beach streets come together diagonally at the very spot where the railroad passes; also, at the very spot where they make up the trains.

SAMUEL H. METCALF,

Sworn to and subscribed, May 24, 1856, before

GEO. H. CUTLER.
JAMES SILL,
Examiners.

J. C. Spencer, produced by respondents was sworn, and testified as follows:

I reside in Erie. I am forty-two years of age, and Secretary and Treasurer of the Erie and Northeast railroad company.

Q. State if you are the Secretary of the Erie and Northeast railroad company, and was there a meeting of the stockholders of the said company held on the fifteenth of this month, on the subject of the acceptance or rejection of the act of 22d of April, 1856? If so, state whether the said act was accepted by the stockholders.

[This question objected for the following reasons: 1st. Because what is proposed to be proved, is entirely irrelevant to any issue raised in the complainants' bill or in respondent's answer. 2d. Because the evidence offered does not prove or tend to prove that the act of October 6, 1855, is constitutional, but if anything goes to show that that act was, in the opinion of the Legislature (that passed the act of 22d of April, 1856), either constitutional or so unjust in its provisions that it was out of respect for the State of Pennsylvania, and the chartered rights of the Erie and Northeast Railroad Company compelled to repeal it. And 3d. Because it is the wish of the complainants and their legal right, that the constitutionality or binding effect of the act of October 6, 1855, shall be passed upon by the Supreme Court of this State and of the nation, irrespective of and unembarrassed by the evidence offered, being the acceptance of an act passed after the institution of the bill in this case, and after a preliminary injunction had been refused.]

A. I am the Secretary of the Erie and Northeast Railroad Com-

pany. There was a meeting of the stockholders of the said company held on the 15th May instant, at their office, in the city of Erie, as to the acceptance or rejection of said Act of April 22, 1856. The act was accepted by a majority of the stockholders present. There was sixteen hundred and forty-five votes for the acceptance of the bill, representing seven thousand four hundred and sixty-four shares of stock, and twenty-three votes against the acceptance, representing forty-four shares of stock.

Q. Have you a copy of the proceedings of that meeting? If so, please append a copy thereof.

A. I have a printed copy, which I think is a correct copy of the proceedings of said meeting, which I hereby append to my testimony, signed by myself and the examiners, and marked as "Exhibit B."

Cross-examined by Complainants.

Q. State when Henry Cadwell resigned as a director, and when Wilson King was first appointed a director of the company.

(This question objected to because not cross-examination.)

A. At a meeting of the Directors of the Erie and Northeast Railroad Company, held July 25, 1849, the resignation of Henry Cadwell was accepted, and Wilson King appointed to fill the vacancy. That was the first that he was a director.

Q. State whether the act supplementary to the act incorporating the Erie and Northeast Railroad, passed in April, 1852, regulating the manner of voting by the stockholders, as to the number of votes, was accepted by the company, and whether they have voted as therein prescribed, from that until this.

(This question objected to, because, if evidence at all, was evidence on the part of the complainants in chief, and is not a cross-examination to anything certified to by the witness in chief.)

A. That act of April 14, 1852, changing the mode of voting in the Erie and Northeast Railroad was accepted by the stockholders, and they have since voted under it.

Cross-questioned by Respondents.

Q. What was the width of the gauge of the Northeast Railroad on the 14th of April, 1852, and has not that since been changed by order of the Directors of the Erie and Northeast Railroad Company, and was it not of a different gauge in 1854, and at this time?

A. The gauge of that road was six feet on the 14th of April, 1852. It was changed in December, 1853, with the exception of the breaks, and has since continued at the four feet ten inches gauge.

J. C. SPENCER.

Sworn to and subscribed before (May 24, 1856).

JAMES SILL,
GEO. H. CUTLER,
Examiners.

May 24, 1856, respondents submit a copy of preamble and resolution passed by city council, which is assented to by complainants.

JAS. SILL,
Examiner.

At 1 P. M. examiners adjourned, the testimony being closed.

JAMES SILL,
GEO. H. CUTLER,
Examiners.

Exhibit "A" of Respondents.

CHARLES M. REED, ESQ.,
President of the Erie and Northeast Railroad Company.

SIR: You are hereby notified to change the location of the Erie and Northeast Railroad, from a point on the east side of the Six Mile Creek, in the township of Harbor Creek, to a point near Joseph Greenwood's house, as said railroad, when made, will materially and seriously obstruct the public road or highway, called the "Ridge Road," from the first mentioned point to the last, a distance of about one mile and a quarter, contrary to the seventh section of the act of Assembly incorporating your company.

ROBERT MOORHEAD,
PHILIP D. BRYANT,
Road Commissioners.

Harbor Creek, November 14, 1849.

This is the paper referred to in my testimony as exhibit "A."

P. D. BRYANT.

We certify to the same.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Erie and Northeast Railroad Company.

Agreeably to public notice, a meeting of the stockholders of this company was held at their office in Erie, on Thursday the 15th inst., which was organized by appointing George Palmer, Esq., Chairman, and J. C. Spencer, Secretary.

On motion, they then appointed tellers, and proceeded to vote on the acceptance or rejection of the act of 22d April last, relative to this road.

There was 1,645 votes for the acceptance of the bill, representing 7,464 shares of stock, and 23 votes against the acceptance, representing 44 shares of stock.

The following resolutions were also passed:

Resolved, That the Directors of this Company be and are hereby requested to employ a competent engineer or engineers to examine the two routes proposed for the Pittsburg and Erie Road, viz. the

western, leaving the Lake Shore road at the most proper point west of Girard, and the eastern, known as the Waterford route; and to ascertain, as near as practicable, by the 8th of July next, the distance, grades, curvature and cost of each, and to employ an agent or agents for the purpose of receiving subscriptions to the stock of said roads, and to ascertain on what conditions the right of way can be obtained upon each route. Also, to appoint a committee to ascertain by which route the coal will be best developed; and further ascertain from the Directors of the Sunbury and Erie Railroad Company whether the interests of their own and the Pittsburg and Erie Road can be advanced by uniting the two roads for any distance, in case the eastern route shall ultimately be adopted by the latter Company; and if so, to what extent and upon what conditions; and also to ascertain from the Cleveland, P. & A. R. R. Co. what arrangement can be made for doing the business on their road between Erie and the point of divergence, in case the western route is adopted. Also, what arrangement can be made to connect the Erie and Northeast Road with their branches to the harbor.

Resolved, That this meeting adjourn to the 8th of July next, in order to receive the report of the engineers and agents appointed to examine the routes proposed for the Pittsburg and Erie Road, to obtain subscriptions, &c., for the purpose of determining by a vote of the stockholders the route of said Pittsburg and Erie Road, and to elect whether they will make a subscription of $400,000, or build a portion of said roads; if the latter, what portion, and any other matters connected with carrying out the provisions of the act this day accepted.

Resolved, That the Secretary be requested to give public notice of said adjourned meeting in the same papers in which the call for the meeting this day was given.

GEORGE PALMER,
Chairman.

J. C. SPENCER,
Secretary.

This referred to in my testimony as Exhibit "B."

J. C. SPENCER.

We certify to same, May 24, 1856.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

[The following is a correct copy of preamble and resolution, passed by the City Councils of the city of Erie.]

December 6, 1852.

The following preamble and resolution were presented by Mr. Smyth, and passed both Councils, viz:

Whereas, The joint resolution granting to the Franklin Canal

Company the right to cross the streets of the city with their railroad, where the same is now located, is not sufficiently guarded and restricted to protect the rights of the city:

And whereas, The City Councils will, at all times, be ready to grant all the facilities in their power to railroads terminating here, when the same will promote the interests of this city, when the policy of such railroad companies shall become settled and fixed with regard to width of track, &c.; therefore,

Resolved by the Select and Common Councils, That the joint resolution granting the use of the streets of this city to the Franklin Canal Company, passed November 12, 1852, and also the resolution passed March 14, 1850, granting to the Erie and Northeast Railroad Company the use of State street from the depot to the Lake, on conditions therein named for railroad purposes, be and the same are hereby repealed.

November 28, 1853.

The following preamble and resolutions, from the Common Council, were read and concurred in, viz:

Whereas, A preamble and resolutions passed the Select and Common Councils the 10th day of November, A. D. 1851, granting the Erie and Northeast Railroad Company the privilege of laying down a track of said road on the north side of Penn street, and two or three tracks on Ritner street, so far as said Council had legal power and authority in the premises, on certain conditions therein set forth:

And whereas, The following is one of the said resolutions, to wit:

"*Resolved further*, That the Select and Common Council reserve the right to withdraw the privilege hereby granted, provided the use and occupancy thereof shall appear to them to be injurious to the interests and welfare of said city."

And whereas, It now appears to the Select and Common Councils, that the use and occupancy of said streets by the said Railroad Company, as now managed, are injurious to the interests and welfare of the city; therefore,

Resolved by the Select and Common Councils of the city of Erie, That the resolutions passed the 10th day of November, 1851, granting the Erie and Northeast Railroad Company the privilege of laying a track of said road on the north side of Penn street, and two or three tracks on Ritner street, be and the same are hereby rescinded and repealed, and all rights and privileges thereby granted are hereby withdrawn, annulled and made void.

Resolved, That a copy of this preamble and resolution be signed by the Mayor and Clerks, and sealed with the city seal, and delivered forthwith, by the high constable, to the President of the said Railroad Company, or one of their officers.

City of Erie, Erie County, Pa.

I certify the above and foregoing to be a correct copy from the records of the Select Council of said city.

Witness my hand and the seal of said City Corporation, this 20th day of May, A. D. 1856.

THOMAS MOORHEAD,
Clerk.

May 24, 1856. This paper submitted as Exhibit "C" by respondents, and assented to without other proof by complainants.

JAMES SILL,
GEO. H. CUTLER,
Examiners.

And afterwards, to wit, on the seventh day of June, in the year last aforesaid, the complainants, by their solicitors, filed in the office of the Clerk of the Court aforesaid, their second amendment to their bill of complaint, in the words and figures following:—

In the Supreme Court of Pennsylvania.

THE ERIE AND NORTHEAST RAILROAD CO.
vs.
JOSEPH CASEY.

In Equity.

Answer the 7th June, 1856.

The complainants by leave of the Court amend their bill by adding to the prayer thereof, after the words "*special tax aforesaid,*" the following words, viz: "And that the defendant account to the complainants for all moneys rec'd by the said defendants, or either of them, by, for, or on account of the freight and passengers carried over the said road, or otherwise.

ST. GEO. T. CAMPBELL,
W. J. HIRST,
E. M. STANTON,
W. M. MEREDITH,
for Compl'ts.

Thereupon, on motion of complainants' counsel, the cause came up for hearing upon the bill, answer, replication, exhibits, and testimony, and being argued by Messrs. Hirst, Stanton, and Meredith for complainants, and by Messrs. Thompson and Franklin for respondent, and the Court being fully advised in the premises, retained the cause under advisement.

And afterwards, to wit, on the sixteenth day of July, in the year last aforesaid, the complainants appeared by their solicitors, and defendant as well by his counsel as in his own person.

His Honor, Judge Black, delivered the opinion of the Court in the words and figures following:—

The act of 6th October, 1855, repealing the plaintiff's charter, is asserted to be void and unconstitutional. To try that question this

bill is brought. We have considered it without any particular reference to the pleadings, because it was expressly agreed by counsel that everything should be disregarded which might prevent the substantial truth and merits of the case from begining reached.

The law is unconstitutional if it would operate to impair the obligation of the contract which was created between the State and the plaintiffs by the act of incorporation. But the power to repeal in a certain contingency, was made part and parcel of that contract.

If the power was exercised agreeably to the contract, its obligation was of course not impaired. (2 Mas. 146; 4 Wheat. 708; 2 Kent 306.)

The prominent obligations assumed by the State, and the plaintiffs respectively, are seen at a glance. The corporators, on their part, bound themselves to build for the State a railroad, to be used by all the people as a public highway.

This railroad was to be made between designated termini within a certain time, and in a prescribed way. In consideration thereof, the State consented to clothe the shareholders with a portion of her own sovereignty, to erect them into a body politic, to delegate to them her right of eminent domain, and to grant them the franchises of taking certain fixed tolls from all who should travel or carry on her highway aforesaid.

But the estate which the corporators were to have in those franchises was expressly limited by this condition, namely, that if the privileges thus given should be abused or misused, the contract might be rescinded by the Legislature. If the corporators did, in fact, abuse or misuse the special privileges with which they were invested by the charter, the resumption of them was not a violation of the contract. It is equally clear that if the Company always behaved itself well, complied in good faith with every stipulation to be performed on its own part, and was never guilty of any abuse or misuse, then the repealing act was contrary to the terms of the contract, and unauthorized by the constitution.

Thus far all are agreed. These legal principles are not disputed at the bar or doubted by the bench. But the *fact* that the Company did abuse or misuse its corporate privileges, is confidently asserted by one party and strenuously denied by the other. How shall this be settled?

For the defendant it is insisted that the repealing act is itself not only evidence, but conclusive evidence, that the Company had previously committed some abuse or misuse which justified the repeal. No case has been cited which denies this doctrine in terms; and it was held for the true rule by the Supreme Courts of Iowa (1 Green, 561), and of New York (19 Barb. 81). But I do not see clearly the principle upon which it can stand. A legislative body in a matter like this is known to proceed without formal notice, without specific accusation, and without opportunity to answer.

There is no confronting of the parties with the witnesses, nor nothing that can be called a hearing or trial.

I would therefore seem unjust to hold that a legislative act is like a judicial sentence, conclusive of every fact which ought to have been found before it was passed.

It might more plausibly be likened to an award made by an umpire, to whom both parties have agreed that the subject should be referred. When one employed to do work for the State consents that its value should be estimated by a State officer, such estimate is binding. If it be agreed, in a contract between a corporation and an individual, that all disputes concerning the subject matter shall be settled by the Company's engineer, the engineer's decision is final (4 W. & Ser. 205). So here the plaintiffs agreed that the Legislature might repeal in a certain event, and impliedly referred the whole question to that body. But even on this view it is not conclusive in any absolute sense of the word, for an award itself may be set aside for plain mistake of law or fact. For myself I incline to the opinion that when the constitutional power of the Legislature to pass a law depends on matter of fact, the party to be affected by it ought to have an opportunity afterwards of showing how the fact is. In saying this, however, I speak for no other member of the Court.

But the plaintiffs are not contented with the privilege of having their proofs heard, to show the unconstitutional character of the act; they insist that all intendments are against it.

Either the Legislature has violated the constitution, or the Railroad Company its charter. In whose favor is the strongest presumption? Legally as well as naturally it is, we think, with the Legislature. But, according to the plaintiffs' argument, we must start with the belief that a board of directors never do wrong, while the General Assembly always acts upon bad motives or false opinions. For a corporation we must have the "charity that endureth all things, and believeth all things;" but to the Legislature of the State we must deny even that common courtesy which heretofore has always been considered as due from one branch of the government to another. Our experiment of a free representative government is not so bad a failure yet as this argument would make it appear.

We have faith enough still in the political system we live under to believe that there can be no just comparison between the fidelity of the men chosen to guard the public interests and those who are appointed merely to make gain for a private body of adventurers. We must presume that members of the Legislature performed their sworn duty. And this presumption is due to them even when it involves the necessity of supposing that a corporation may have abused its privileges.

All Courts have uniformly acted on this principle. It is a maxim, indeed, that he who alleges a law to be unconstitutional, must show it to be so; and, if he leaves it in doubt, it is valid. This of course

means that the Legislature is presumed not only to have put the true interpretation on the constitution, but also to have understood the facts of the particular case, and that it did not wilfully disregard either.

It would be strange certainly if the judiciary would have so much respect for members of Assembly as to follow their judgment implicitly in every difficult question of constitutional law, and at the same time so much contempt as to take it for granted that they are always wrong about the simplest matter of fact. The cases are numerous in which laws have been sustained by presuming the facts necessary to free them from constitutional objections. At our last term for the Western District a cause was before us where the title to an estate, which had descended to several heirs, was vested by act of Assembly for certain purpose in one of them. We held that it was our duty, in the absence of proof on the subject, to presume that all parties in interest had consented to it. Crease *vs.* Bobcock, 23 Pick. 334, was exactly like this. The Chelsea Bank had a charter repealable in case a certain default was committed. It was repealed, and, when the constitutionality of the repealing act came up for decision before the Supreme Court of Massachusetts, it was unanimously decided that the fact necessary to make the law valid must be taken for true, as an inference from the law itself.

A few sentences from the elaborate opinion of Judge Morton will show the conclusion of the Court.

"The legislature," says he, "have restricted themselves from exercising the power of repeal, until a certain event happens. This they must necessarily ascertain before they can properly exercise the power. Their decision must *prima facie* be presumed right. Whether it be conclusive or not, is a question which it is not now necessary to determine." The Supreme Court of the United States have given their opinion on the point in a still stronger case. Cooper *v.* Tellfair, 4 Dall. 14.

The Legislature of Georgia had passed a law, banishing a citizen and confiscating his property for treason.

The State Constitution required all treasons to be tried in the county where committed. The law was therefore void if the offence charged upon the party was committed in any county. The Court, for the purpose of sustaining the law, presumed the very improbable fact that the offence, though committed in the State, was not committed within the body of any county.

On authority and principle we are clearly of opinion that the repealing act must be held constitutional, unless the plaintiffs can show by plain and satisfactory evidence, that the privileges granted in the charter of 1842 were not abused or misused.

But the evidence against the plaintiffs is so strong that not much is left for presumption to do. In the first place, we have the record of an equity suit, in which it was solemnly decided that the plaintiffs had violated their charter by the commission of certain wrong-

ful acts there mentioned. I do not say that this record proves abuse or misuse of the privileges granted to the corporation; for that was not the point of the inquiry. But it does conclusively establish all the *facts* charged in the bill, and adjudged to be true by the final decree.

Whether those facts amount to abuse or misuse is another question, to be considered presently. This is not all. The same facts substantially have been proved over again by fresh depositions taken in the cause.

The parole and record evidence together proves, beyond any possible chance of contradiction, that the plaintiffs put their western terminus, and consequently a portion of the line of road, at places which the act of incorporation did not authorize; taking and using for that purpose ground which they had no right to touch, and which had been legally devoted to other public purposes. It is equally undeniable that they interfered necessarily with several streets, and rendered others wholly impassable; and that part of the Buffalo Road was exclusively occupied by them. This was done in the face of the charter which expressly forbade them to obstruct or impede the free use of any public street or road. These are the facts. Now what is abuse or misuse?

There is nothing profound or mystical about these words. They are terms of art in the law. The popular sense in which they are used every day is well known. To *abuse* is compounded of *ab* and *utor;* and in strictness signifies to injure, diminish in value, or wear *away* by *using* improperly. Catiline abused the patience of the Roman Senate. A man abuses his constitution by excesses which impair its vigor. A judge abuses his office not only by taking bribes, but by any misconduct which detracts from its dignity and usefulness.

To abuse the freedom of the press, or the right of debate, is a phrase from which we take a perfectly definite idea. We know very well what is meant when it is said that legislative authority or executive power has been abused. Why, then, are we expected not to know that a corporate privilege has been abused, when we see it used as a color and pretext for that which the law pronounces a wrong and injury to the public? *Misuse* is a still simpler word. It signifies merely to use amiss. He who would prove that any power has not been misused, must show that it has been always used rightly, or else not used at all. But I admit that these words, like all others, may have different meanings, when spoken with reference to different subjects.

Acts which would be an abuse of one thing may be no abuse of another. We are, therefore, to ascertain precisely what is abuse or misuse of corporate privileges by a company. Abuse includes misuse. We take them both together and define them thus: Any positive act in violation of a charter, and in derogation of public right,

wilfully done or caused to be done by those appointed to manage the general concerns of the corporation. Let us analyze this definition.

1. The illegal act must be *positive*. A mere *omission*, like the failure of a bank to make its annual returns, is not enough. *Non use* is a different thing from abuse or misuse. 2. A disegard of the charter which is injurious only to private interests, and which therefore admits of private compensation, is not, I think, within the fair meaning of the words. It must be some misconduct which infringes upon a right reserved by the State for the benefit of the public. 3. It must be wilful: that is, not involuntary, accidental, or the consequence of mere mistake. But I mean mistake of *fact*. Every man is bound to know the *law*. Especially are the grantees of a privilege like this bound to know the law which limits and defines its extent. They bargained to obey the charter, not as they and their successors might happen to understand it, but according to its true intent and meaning. If we could allow them to have an advantage from their own errors of interpretation, then every grant of corporate privileges must be measured not by the terms of the grant itself, but by the ignorance of the grantees. A power not large when understandingly administered, might become enormous in the hands of dunces; and the dimensions of the same charter would dilate and contract in proportion to the degree of intelligence that each new set of directors would bring to the business. So high a premium for ignorance would cause it to be feigned sometimes, when it does not exist. The rule is a wise one which conclusively presumes that the managers of railroad companies, like every body else, understands the law which prescribes their duties. 4. It cannot be said that the company has been guilty of abuse and misuse every time a subordinate officer or agent transgresses the act of incorporation, without authority, express or implied, from the Board of Directors. It is not sufficient, for instance, that a conductor of his own head should charge an exorbitant fare. But if the directors should establish a tariff of tolls greater than the law allows, and compel the public to pay them, this would be a manifest abuse.

The plaintiffs have set up no excuse for their misconduct, except that they did not understand the act of incorporation.

This is wholly inadmissible in point of law. As a matter of fact, it is more than doubtful. The act of incorporation fixed their terminus at the Borough of Erie. They knew exactly where this was in 1842, when they got their charter. It is hard to say how anything but wilful blindness could make them believe that a subsequent change in the limits of the borough, and its erection into a city, was an extension of their charter.

But allowing this to pass, what can be said for their obstruction of roads and streets? They could not misread the command on that subject. The same clause forbids them to take down a dwelling house, or run through a graveyard. They could shut their eyes as easily on a whole as on a part of the prohibition. They had their

charter six years before they struck a blow. There was time enough for deliberation and consultation. Then they used it is a color for the commission of public wrongs, which it expressly forbade.

They lived in the guilt of these wrongs, and in the daily repetition of them, for six years more, and yielded at last only to the power of an injunction. To say now that all this was involuntary, accidental, a mere innocent blunder, is not a defence, but an *offence.*

Much has been said in argument about the consent which the councils and people of Erie gave to the illegal location. It cannot be said that the evidence fairly makes out this fact. Some of the citizens were in favor of it, some opposed to it; many were silenced by the assurance that it was a mere temporary arrangement, and the majority perhaps were indifferent.

The councils gave their assent with the express proviso that they might withdraw it whenever they saw fit. But if the councils had given their absolute consent, and the whole population had backed them, what would it amount to? It might serve some purpose as a make-weight in settling the balance of mutual grievances between the town and the railroad companies; but no man can seriously believe that it is a legal excuse, or that it would change the responsibilities of these plaintiffs to the State. I must do their counsel the justice to say that they have not urged it as having that effect.

When the cause first came before us on the motion for a special injunction, the bill was not so framed as to deny the fact of abuse and misuse. The unconstitutionality of the repealing act was then put principally on the ground that our decree against the company on the former suit was an estoppel; an estoppel upon the State which prevents her from letting the General Assembly pass a law, or render it void after it is passed.

The notion seemed to be that whatever was a good defence for a corporation in Court on a *quo warranto,* would be equally available as a ground for setting aside a legislative revocation of its franchises. In other words, a charter that cannot be forfeited, cannot be repealed. Therefore, if a railway corporation abuse its powers by committing a nuisance, no court can compel it to abate the nuisance, without taking away from the legislature the power of repeal, at least so far as that power depends on the same abuse.

There is not the faintest resemblance between the forfeiture and the repeal of the charter, except that dissolution of the corporation is a consequence of both. One is a legislative, and the other a judicial act. The power of the legislature and the power of the court are based on different foundations; are bestowed for different purposes; depend on different principles; are exercised in different ways; and their acts are valid or void for different reasons.

The right of repeal (if it be reserved) is a limitation of the estate which the corporators have in the franchises; forfeiture takes away the franchises whatever may be the extent of the grant. The Commonwealth can come into one of her courts and claim a forfeiture only

when there is no rule of law to forbid it; but a charter may be repealed without regard to the law, unless it be protected by some specific prohibition of the constitution. The law in some cases will enable a corporation, which is arraigned on a *quo warranto*, to keep the truth away from the court, by pleading an estoppel; but the constitution does not forbid the legislature to know and act upon the truth in any case whatever. Courts it is said lean against forfeitures; and this is perhaps truer than it ought to be; but the legislative department of the government, when it has the control of a corporation, must be allowed to lean as it pleases. The annals of jurisprudence do not show that these two things have ever been confounded before.

Nor will it do to say that the facts and legal principles now invoked to save this corporation are part of the contract. The contract made the right of repeal dependent on the fact of misuse or abuse alone. If there was misuse or abuse, the repeal merely enforced the contract. It is alleged that, since the contract was made and broken, certain other things have been done which puts the parties in a new relation, and forbids the enforcement of the contract. It is unreasonable and contradictory in terms to say that what estops a party from setting up or claiming under a contract is, or can be a part of the same contract.

In Satterlee *v.* Matthewson (2 *Peters*, 411), the title to the land in dispute depended on the question whether a certain lease created the relation of landlord and tenant. It did not. When made it was wholly null and void, because the lessor claimed under a Connecticut title.

The legislature passed a law declaring that the relation of landlord and tenant should nevertheless be deemed and taken to exist. This legislative act changed the effect of the lease to the prejudice of one party and the advantage of the other, and by consequence it destroyed a legal title previously vested.

But it was held constitutional by this court and by the Supreme Court of the United States, though censured as unwise, injust, retrospective, and a violation of vested rights. It was declared that to violate a void contract was not to impair it, and if the law was clear of that specific objection no other could avail.

The principle of Saterlee *v.* Matthewson was enforced in Mercer *v.* Watson (1 Watts, 355), with one of Judge Gibson's irresistible arguments, and by Judge Baldwin, with a force nearly equal, in Thomson *v.* Phillips (1 Bald., 248), and in Branch *v.* Boggs (1 Bald., 60). If the highest authority directly on the point is to be binding—if we are not to make the law as we go—we must take it for settled that Art. 1, Sec. 10, of the Federal Constitution, or Art. IX., Sec. 10, of the State Constitution is not violated by an Act of Assembly, unless the act would operate *directly* on some contract, and *literally* impair its obligation. The act under examination has no direct operation on the contract, except to enforce one of its provisions. The compliance of the company with our decree may have created obligations

on the part of the State to be generous, to use her authority with moderation, and to let the violators of her law pass without further chastisement. But they were not obligations of the contract. Whether they existed, and if they did, whether they should be regarded or not, were questions for the legislature to decide.

If we would declare a legislative act void on the ground of estoppel, the doctrine would render all reservation of the right to repeal nugatory. No matter how absolute and unconditional the right of repeal is, its exercise would be open to this sort of objection. In almost any case, a corporation could say to the State, "You saw our money subscribed, our labor expended, and the public work performed; our charter is not liable to forfeiture in court. You are estopped." These arguments would have been no weaker in the present case, if the representation had been absolute, than they are now with a reservation dependent on a condition which the corporators have broken. McLarren *v.* Pennington (1 Paige, 107), was the case of a bank charter with an absolute right of repeal. The State took a bonus of $25,000 for the charter, and repealed it in less than a year afterwards.

Was not the receipt of a bonus a complete estoppel?

In court it would be certainly. But if the bank had thought of setting it up as a ground for declaring the repeal void, the answer would have been simply that the repeal was not contrary to the contract. The same answer here is quite as effectual.

I cannot say that this idea of an estoppel on the legislature has been abandoned; for I know not that the company's counsel are convinced of its fallacy. But it is certain that at the final argument it was not insisted on, and the bill has been changed so as to take different ground. It is now alleged that the act of 14th April, 1852, and the decree of this Court, pronounced on the 7th September, 1854, were new contracts between the State and the company, by both of which the State promised to waive all previous abuse and misuse, and not to repeal the charter on account thereof. If there were such contracts the repealing act certainly impaired their obligation, and is therefore void. Let us see if the fact be true as asserted.

We are obliged here again to repeat what has been so often said, that a contract between the State and a corporation cannot be raised by implication. Judicial construction in favor of a company will go so far, and so far only, as the State or her authorized agents *intended* to go when the contract was made, and that intention must be expressed in words too plain for doubt. Apply this to the Act of 1852. It authorizes the stockholders to vote for directors in a way which had been previously forbidden, and it contains a general provision relative to the gauge of railroads in Erie County. But no intention to embrace any other subject is hinted at in the remotest manner. Yet we are asked to declare that there is an agreement in it not to use the repealing power according to the terms of the ori-

ginal charter. We could insert anything else into it just as easily. We might as well say that it contains a contract to sell the commonwealth out and out.

It is, if possible, more difficult still to make a contract out of our decree for the removal of the road. It has no single element of a contract in it.

No thought of bargaining was in the mind of any judge, or counsel, or party. Least of all, did we intend to take from the General Assembly any power which the constitution bestowed, or add any privilege to the company which the charter did not give. On the contrary, we expressly declared that nothing beyond the charter could be expected at our hands. If we have any authority to make a new contract, or to change the terms of an old one between the State and a corporation, we have all along been mistaking the nature of our functions; and if a decree and a contract be the same thing, we have heretofore misunderstood the meaning of both words.

The preamble of the repealing act has been criticized with a minuteness which its importance does not warrant. It is no part of the law. When the words of the enacting clause are very doubtful, we may look at the preamble as one means of discovering the intent of the lawgiver.

It is a very unsatisfactory resort even for that purpose, as is abundantly shown by the authorities collected in Dwarris on Statutes, page 655, and by general opinions of this Court: 1 Watts, 355; 4 Ser. & R. 151. But this is no question of construction. Nobody doubts the meaning of the act under consideration. It is undeniably intended to repeal the company's charter; and what is more, the preamble has not a word in it inconsistent with that intention.

It is conceded that the preamble is inartistically drawn. Some important facts are omitted, and others are defectively stated. But the law would be good without a preamble, and a bad one does not hurt it. If the proposition could be admitted that a statute of which the whole enacting part is clear, unambiguous, and free from all conflict with the *lex legum*, is nevertheless void because it does not accord with something said in the preamble, it would form a head of constitutional law as new and rather more startling than that of estoppel itself. We have said that estoppel is no part of the constitution, but preambles are not even part of the law.

It is further objected to this law, that it is an act of confiscation —takes private property for the public use of the State without compensation. The government of the United States is forbidden to do this by the federal constitution. That instrument, of course, has nothing to do with this part of the case. But the State constitution also declares that "no man's property shall be taken or applied to public use without the consent of his representatives, and without compensation being made." Does this act violate the State constitution in that part of it? We answered this in the negative

when we refused the special injunction, and give reasons which need not now be repeated. Railroads built under the authority of law for the general purposes of commerce are public highways. On this principle alone we decide that municiple subscriptions were valid. On this principle alone can land and materials be seized to make them. On this principle alone can the laws be justified which limits the tolls upon them. On this principle alone have we the power, so often exercised, of compelling those who have charge of them to keep within the boundaries of the law. On this principle alone we have always held that no individual or corporation can possibly have any right or privilege connected with them except what the law had expressly conferred. The charter of this company contained a series of regulations presenting the manner in which a public highway should be used; the repeal abolished those regulations and substituted a different set. By the charter, and by the charter alone, were the plaintiffs authorized to interfere with it at all; the repeal necessarily took that authority away. A public highway is not private property, any more than a public office is private property. The execution of the law relating to an office is intrusted to an individual; a corporation as well as an individual may be intrusted with the execution of the law which relates to a highway. In either case, if the trust be abused it may be withdrawn; but neither the highway nor the office is thereby extinguished. The people still have a right to be served in both, and it is the duty of the State to see that they are.

The removed officer has no right to keep the records, and the removed company has no right to keep the road. If this law be unconstitutional because it takes the road from the company, then it follows that no charter of a railroad, canal, or turnpike company can ever be repealed, however clear the right, nor forfeited however gross the abuse, without leaving the highway in possession of the corporators as their private property, and giving them, as private owners, a control over it infinitely greater and more dangerous than they had before.

The suggestion that the repealing act will have the effect of putting the road into the possession of the persons whose lands were taken to build it on is entitled to still less regard. In the first place, it is founded in manifest error. The lands were taken and devoted to *to* public use as a highway forever, unless the State should see proper to vacate and abandon the road. It has not been vacated or abandoned. It is to be used by the public as heretofore. The public will has been expressed that it shall be hereafter used in a different way, and the public rights upon it be guarded by different agents.

If this be a vacation of the road, then the Columbia Railroad would be vacated by a change in the Board of the Canal Commissioners. Again, the landholders are not complaining of this law, nor have they authorized the company to complain for them.

It is nothing to them whether the State chooses to let the cars

run over the road under the command of one agent or another. But even if the land owners were here and could prove that the lands has reverted to them by the operation of the repealing act, I presume nobody thinks it would be unconstitutional for that reason.

Another and most important point has been raised in the case on the final argument. Since this bill was brought, and since the motion for a special injunction, to wit, on the 22d of April, 1856, the legislature passed a new act of incorporation for the plaintiffs, giving them new privileges, and imposing upon them new duties and restrictions. This act was accepted by the stockholders, and under it the road has been redelivered to the company. Why then do they insist on a judicial recognition of their franchises under the repealed charter? This might be hard to answer, unless it be that they think the old charter more advantageous than the new one. They probably intend, if they can, to repudiate the contract they made with the State in 1856, and fall back upon that of 1842.

But could they do this even if the intermediate repealing act were void? Most certainly not. The charter of 1842 is repealed by the act of 1856, if it was never repealed before. They will not say that the last mentioned repeal is void, for they gave it their full assent. These plaintiffs then are before us demanding a restitution of what they call their rights, under a contract which they themselves have solemnly agreed to rescind, and in whose place they have substituted a new contract, of which they are at this moment enjoying the benefits and advantages.

We are thoroughly satisfied that if there were no other objections to the plaintiffs' case we would be obliged to dismiss the bill, for the sole reason that the law under which they claim has been repealed with their own consent.

The only specific relief prayed for in the bill, as originally filed, was an injunction against the defendant to restrain him from taking possession of the road and collecting the tolls. Under the act of 1856, they have got already what is better than an injunction—the actual enjoyment of all they ask—the full possession of the road. They need no injunction, and can have none, to protect a right which nobody intends to take away. But they have amended their bill so as to pray for an account. There is no averment nor no evidence of any fact which shows that they ought to have an account. We are convinced that the defendant has no money in his hands to which the plaintiffs even pretend to claim. When this point was discussed at the bar nobody asserted that the plaintiffs had any just demand upon the defendant for money.

The prayer of the plaintiffs to be protected in the possession of the railroad and its receivers, under the charter of 1842, must be refused: 1st. Because that charter was constitutionally repealed, in 1855, for abuse and misuse. 2d. Because it was also repealed in 1856, with their own consent. 3d. Because they have the railroad in their possession under another charter which they have accepted.

Their prayer for an account is refused, because they show us no ground nor reason for believing that there is any account between them and the defendant. It is ordered, adjudged, and decreed, that the plaintiffs' bill of complaint in this cause be dismissed, and the defendant do recover from the plaintiffs the costs by him in this behalf expended.

Lewis, C. J., dissented, and Woodward, J., was absent on the final argument.

And afterwards, to wit, on the 28th day of July, in the year last aforesaid, the clerk of the Supreme Court of the State of Pennsylvania, for the Middle District in said State, filed in the office of the clerk of this Court certified copies of the Docket Entries, made by him on the trial and hearing of the above stated cause, in the words and figures following, to wit:—

IN THE SUPREME COURT OF PENNSYLVANIA,
Middle District, Harrisburg.

ERIE AND N. E. RAIL R. CO.
vs.
JOSEPH CASEY.

Bill in equity, filed 5th May, 1856. Argued by Meredith and Hirst for plaintiffs, Casey *pro* def't.

Amendment to defendant's answer, filed and admitted, wherein the Court make the following order:—

6 May, 1856. The Court being satisfied that the amendment to the answer, moved for by Mr. Casey, is necessary to reach the merits of the case, do allow the said amendment to be filed upon terms:—

That the testimony on both sides be taken before examiners, and closed on the 4th Monday of May instant.

That the final hearing of the cause, upon bill answering and proof be heard upon Saturday, June 7th, prox.

On motion of Mr. Casey, the Court appoint the same examiners who took proof before 6 May, '56.

Ordered that the Cleveland, Painsville, and Ashtabula Railroad Co. *vs.* City of Erie, be read at the same time.

Exit copy of Order of Court to Wm. S. Hirst, pl'ff.

Exit copy of order to Joseph Casey, and two copies of amended answer *pro* def't.

And now, to wit, 19th May, 1856, on motion of defendant, the Court order: 1st. That the testimony taken by both parties in the case of the Commonwealth ex re. F. W. Hughes *vs.* the Erie and Northeast Railroad Co., No. 7, Dec'r term, 1853, with the exhibits, maps, and diagrams, &c., attached to the record, or given in evidence, in said cause, may be read as testimony in this case, on the hearing of the same, as though it had been taken in this cause.

That the clerk of the Eastern District be directed to certify the

proceedings in the said cause, No. 7, Dec'r term, 1853, to this District, before the 7th June proximo. *Motion refused.*

May 31st, 1856. Plea in bar filed, subject to complainants' counsel, and order granted to prothonotary of Eastern and Western Districts.

June 7th, 1856. Cause set down for hearing by complainants. Argued by Hirst, Stanton, and Meredith, for complainants, Thompson and Franklin *pro* def't.

July 16th, 1856. It is ordered, adjudged, and decreed, that the plaintiffs' bill of complaint in this cause be dismissed, and the defendant do recover from the plaintiffs the costs by him in this behalf expended.

Certified from the record.

[SEAL.] WM. H. MILLER,
Proth'y S. C.

And afterwards, to wit, on the 28th day of July, in the year last aforesaid. The complainants by their solicitors filed in the office of the Clerk of the Court aforesaid, the two several certificates of the Honorable Ellis Lewis, Chief Justice of said Court, in the words and figures following:—

THE ERIE AND NORTHEAST RAILROAD COMPANY
vs.
JOSEPH CASEY.

In Equity.

I, Ellis Lewis, Chief Justice of the Supreme Court of Pennsylvania, do certify, that this cause came on to be heard upon the bill of complaint, answer, exhibits, and testimony, and was argued by counsel, and the court being fully advised in the premises, were of opinion that the law and the equity is with the defendant, and it was thereupon ordered, adjudged, and decreed that the bill of complaint be dismissed with costs.

And thereupon upon motion of the complainants, it is hereby certified, and ordered to be made part of the record herein, that in the above entitled cause the complainants claimed, and prayed the aid of the Court to protect and secure to them the rights and privileges granted to them by an act of the general assembly of the commonwealth of Pennsylvania, entitled "An act to incorporate the Erie and Northeast Railroad Company, and for other purposes," approved the 12th day of April, 1842. And an act of the general assembly aforesaid, entitled "An act to reduce the capital stock of the Erie and Northeast Railroad Company," approved the eleventh day of March, 1846; and the 14th and 15th sections of an act of the general assembly aforesaid, entitled "An act to incorporate the Northeast Cemetery, and to change the mode of voting in the Erie and Northeast Railroad Company," passed 14th April, 1852. Ap-

proved the 14th of April, 1852. And also an act of the general assembly aforesaid, entitled "An act repealing the acts regulating the gauge of the track of railroads," approved the 11th day of April, 1853, copies of which acts, and sections of acts are filed as exhibits in this cause respectively.

And the defendant by way of defence to the prayer of said petition set up an act of the general assembly aforesaid, entitled "An act to repeal the charter of the Erie and Northeast Railrod Company, and to provide for disposing of the same," approved the 6th of October, 1855, which last mentioned act is also filed as an exhibit in this cause marked "I," and the defendant claimed that by virtue of the operation of said act last mentioned, all and singular the rights and privileges theretofore granted to the complainants by the acts of assembly authorizing the governor to incorporate the same, passed the 12th of April, 1842, or by any act of the general assembly supplementary thereto, had been, and the same was revoked, and utterly and forever annulled, and that the rights and privileges so granted by the general assembly to the complainants by the several acts and sections herein first mentioned had been, and were resumed by the legislature.

And it is further certified, that there was drawn in question in said cause, the validity of the said act of assembly, entitled "An act to repeal the charter of the Erie and Northeast Railroad Company, and to provide for disposing of the same," the said complainants claiming that it was a violation of an agreement and contract between the State of Pennsylvania and the said complainants, and on that account repugnant to and in violation of the Constitution of the United States, and to the provisions of the 10th section of the first article of said constitution; but the Court here held and decided that the act of assembly aforesaid was not repugnant to and in violation of the Constitution of the United States, and to the provisions of the 10th section of the first article of said constitution, and that said act of assembly was valid.

And it is further certified, that the decision of the question as to the validity of the said act of assembly, entitled "An act to repeal the charter of the Erie and Northeast Railroad Company, and to provide for disposing of the same," approved the 6th of October, 1855, was necessary to the decision of said cause, and the decision in the premises was in favor of the validity of said statute.

And I do further certify, that the said Supreme Court of Pennsylvania, is the highest Court of law and equity of the State of Pennsylvania in which a decision of this suit could be had.

And it is ordered that this certificate and the exhibits aforesaid, be made parts of the complete record in this cause.

ELLIS LEWIS,
Chief Justice of the Supreme Court of Pennsylvania.

IN THE SUPREME COURT OF PENNSYLVANIA.

THE ERIE AND NORTHEAST RAILROAD COMPANY
vs.
JOSEPH CASEY.

In Equity.

I, the Honorable Ellis Lewis, Chief Justice of the Supreme Court of Pennsylvania, the highest court of law and equity in the said State, do hereby certify that there was drawn in question in the above case the validity of a statute of the State of Pennsylvania, on the ground that the said statute is repugnant to the Constitution of the United States, and that the decision was in favor of the validity of the said statute.

Witness my hand this 28th day of July, A. D. 1856.

ELLIS LEWIS.

COMMONWEALTH OF PENNSYLVANIA, *ss:*
Eastern District, City and County of Philadelphia.

I, Robert Tyler, Prothonotary of the Supreme Court of Pennsylvania, within and for the Eastern District, do hereby certify that the foregoing is a full and correct transcript of the proceedings had in the above stated or named case, wherein the Erie and Northeast Railroad Company were complainants, and Joseph Casey respondent, as the same is of record in my office, and the foregoing bill of complaint, answer, replication, exhibits, and testimony, decree and certificates, are truly taken and correctly copied from the originals on file in the said case, and as the same appear of record in my office.

[SEAL.] Witness my hand and the seal of said Court, at the city of Philadelphia, this fourth day of December, A. D. 1856.

RO. TYLER,
Prothonotary.

I allow a writ of error and supersedeas in this case.

ELLIS LEWIS,
Chief Justice of the Supreme Court of Pennsylvania.
Dec. 3d, 1857.

And afterwards, to wit, on the 29th day of November, in the year last aforesaid, the complainants, by their attorney, filed in the office of the Clerk of Court aforesaid, their bond in the words and figures following, to wit—

Know all men by these presents, that we, Samuel H. Austin and Willis R. Austin, No. 63 South Seventh Street, Philadelphia, are held and firmly bound unto Joseph Casey, in the full and just sum of two hundred dollars, to be paid to the said Joseph Casey, certain attorney, executors, administrators, or assigns, to which payment

well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this twenty-second day of November, in the year of our Lord one thousand eight hundred and

Whereas lately at a Supreme Court of the State of Pennsylvania, in a suit depending in said court between the Erie and Northeast Railroad Company and Joseph Casey, a final judgment was rendered against the said Erie and Northeast Railroad Company, and the said Erie and Northeast Railroad Company having obtained a writ of error, and filed a copy thereof in the clerk's of the said Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Joseph Casey, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday in December next.

Now the condition of the above obligation is such, that if the said Erie and Northeast Railroad Company shall prosecute the said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

SAML. H. AUSTIN, [SEAL.]
WILLIS R. AUSTIN, [SEAL.]

Sealed and delivered in presence of
W. L. HIRST.

Approved by
J. T. BELSTERLING,
pro Proth'y.

Which said writ of error is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States, to the Honorable the Judges of the Supreme Court of the State of Pennsylvania, greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said Supreme Court, of the State of Pennsylvania, before you, or some of you, being the highest Court of law or equity of the said State, in which a decision could be had in the said suit between The Erie and Northeast Railroad Company and Joseph Casey, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States,

and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said Erie and Northeast Railroad Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and fifty-five.

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

Allowed by
RL. GRIER.

(*Exhibit.*)

IN THE SUPREME COURT OF PENNA.

Final record of the case of

THE COMMONWEALTH OF PENNSYLVANIA, ex relatione FRANCIS W. HUGHES
vs.
THE ERIE AND NORTHEAST RAILROAD COMPANY.

Of December Term, 1853. No. 7. In Equity.

Filed as an Exhibit in the case of

THE ERIE AND NORTHEAST RAILROAD COMPANY
vs.
JOSEPH CASEY.

(*Thompson and Grant and Griscom.*)

THE COMMONWEALTH OF PENNSYLVANIA, Ex-relation of Francis W. Hughes, Attorney-General,
vs.
THE ERIE AND NORTHEAST RAILROAD COMPANY.

(*St. G. T. Campbell, Wm. L. Hirst.*)

Docket Entries. December Term, 1853. No. 7.

Bill in equity filed December 30th, 1853, and subpœna issued ret'ble the first Monday of Feb'y, 1854. "Served."

February 20th, 1854. On motion of Geo. Griscomb, Esq., for complainant. Rule on def'ts to answer on or before the second Monday of March next.

March 1, 1854. Exhibits filed to go with the bill for injunction.

" 13, " The demurrer and answer of the Erie and North-east Railroad Company filed.

" 21, " Geo. Griscom and Geo. M. Dallas, Esqs., solicitors for complainant, move the Court for the appointment of examiners to take testimony in the above entitled case in the City of Erie, and Erie County, and that the Court do make such order therein as may be according to equity.

March 22, 1854. Replication filed.

" 25, " On motion of Mr. Griscom and Mr. Dallas, the Court appoint James Sill and George Cutler, jointly to be examiners to take depositions and other evidence in the City of Erie, and Erie County, to be read on the hearing of the above case; and it is ordered that at least ten days' previous notice to be given the parties at Erie before commencing to take testimony, and that testimony be taken only at one place at the same time.

April 7th, 1854. On motion of Wm. L. Hirst, Esquire, that the Court make an order in this case to speed the cause by directing the testimony on both sides to be closed at an early day to be appointed by that Court; and that, in the mean time all proceedings at law, either in their civil or criminal courts at Erie County, wherein the plaintiffs are a party, relating to the rights of property, and the defendants, be suspended until final decree of the Court, *per curiam.* Opinion, motion refused. Opinion filed.

July 20th, 1854. Depositions on part of respondents filed.

" 25th, " " " complainants filed.

" " " Argued.

October 14th, 1854. Certificate of the Prothonotary of the Western District, filed in words following, to wit:—

Oct. 6, 1854. It is ordered that the Prothonotary of the Eastern District be and hereby is directed to certify the record and proceedings in this case to the Prothonotary of the Western District without delay.

Ex die.

Record, &c. certified and sent as directed.

For opinion of Black, C. J., decree and dissenting opinion of Lewis, J. (See page 207.)

Dec. 19, 1854. The defendants in this cause having submitted to the Court another plan for a change in their railroad at the place where it interferes with the Buffalo Road. It is ordered that the said plan be filed, and seeing no reason to believe that by this plan the Buffalo road will be illegally interfered with, or its free use be obstructed or impeded within the meaning of those words as used in def'ts charter, we approve it. The said def'ts have also moved by their counsel for an extension of the time within which the decree

required them to complete the change in their works, and we think it reasonable that the time should be extended. It is therefore ordered that sixty days further time after the 7th day of January next ('55), be allowed the defendants to do the acts and things which the said decree required them to perform. This approval of the plan and extension of the time for executing it, does not and cannot in any manner or degree effect the question. The right to make the railroad has been forfeited by the fact that it *was not* properly made within the time mentioned in the charter.

If anything in this whole proceeding can have any influence on that question, it was the original decree, and not the orders made at different times concerning the mode of its execution. *By the Court.* Lowrie and Knox, J'ds., dissenting.

Jan'y 9th, 1855. Affidavit of William Case filed, and Wm. L. Hirst, St. Geo. T. Campbell, and Wm. M. Meredith, Esqs., move for a writ of assistance.

Jan'y 10th, 1855. Affidavit of Wm. Case filed.

" " " Motion for a writ of assistance argued.

" " " It is ordered that a writ of assistance to John S. Keyser, or to some person to be by him deputized by issued commanding by all lawful force and means to protect the property and Railroad of the said Erie and Northeast Railroad Company, and to protect the officers, agents and servants thereof, in restoring and replacing the said railroad in the same condition and position in which the same was when the last order and decree of this Court in this cause was made, and to maintain the said company in the possession thereof. Knox, J., dissenting; reasons filed.

January 12, 1855. On motion of W. M. Meredith, Esqr., certain affidavits in support of the writ of assistance granted by the Court in this case be filed *nunc pro tunc.*

Jan'y 12th, 1855. On motion of W. M. Meredith, Esqr., certain affidavits in support of the writ of assistance granted by the Court in this case were filed *nunc pro tunc.*

Affidavit of George Seldon, Thomas Lennon, William Hinton, D. C. Miller, T. W. Dobson, W. P. Gilson, James Sutherland, G. W. Wilson, J. R. Ferguson, and T. B. Vincent. Deposition of Miles Boyles, George W. Wilson, H. H. Briggs.

January 13th, 1855. Affidavit of Thos. W. Dobson, filed *nunc pro tunc.*

John S. Keyser filed, S. S. Spencer filed.

Feb'y 3d, 1855. Wm. M. Meredith, W. L. Hirst, and St. Geo. T. Campbell, Esquires, def'ts' counsel, moved for an extension of time to comply with the order and decree of the Court of September 7th, 1854, and the Court order the motion to be heard on Saturday, Feb'y 17th, 1855, at 10 o'clock A. M.

Feb'y 17, 1855. Motion argued, affidavits on part of complainants read and filed.

Feb'y 17th, 1855. W. M. Meredith, W. L. Hirst, and St. Geo.

T. Campbell, Esqrs., for defendants, move the Court for the following order:—

Inasmuch as a bill has been filed in this Court by the Cleveland, Painesville, and Ashtabula Railroad Company against the City of Erie, whereby it is claimed that lawful authority is given to the said company to connect with the railroad of the defendants. And whereas, upon the final hearing of the said cause this question, with the others therein pending, will be finally determined by this Court, and inasmuch as great injury will be done by interrupting the connection of said road, It is therefore ordered that the time for the execution by the defendants of the decree of this Court of the 7th September last, be and it is hereby extended until the expiration of ninety days from this date. *Provided*, That the said decree of the 7th of September, so far as the road at Harbor Creek is therein referred to, shall be executed within thirty days from this date.

Knox, J., not agreeing to said decree.

March 17th, 1855. It is ordered that the time for executing the decree of the Court in reference to the Harbor Creek part of the defendants' road be extended until the third Monday in May next, and that the other part of the motion is refused, the writ of assistance to remain in force as before in regard to the existing road.

Lowrie & Knox, Js., dissenting.

April 7th, 1855. Def'ts' counsel moved the Court for an order that the execution of the decree of the Court in regard to the removal of the defendants' road in the City of Erie be postponed until ninety days after the final decision of this cause. Motion argued *eo die per curiam*. Motion for admonitory order refused. Opinion filed.

April 10th, 1855. Motion that the Court make an order that the execution of the decree of the Court in regard to the removal of the def'ts' road in the City of Erie be postponed until ninety days after the decision of this cause refused.

June 3d, 1856. Certificate of the Prothonotary of Middle District filed in words following, to wit: "And now, to wit," 31st of May, 1856, the Court, on motion of Joseph Casey, Esqr., authorize and direct the Prothonotary of the Eastern District to entrust to the said Casey the record and papers in the case of the Com'th ex rel. Francis W. Hughes *vs.* The Erie and Northeast Railroad Company, No. 7, Dec. T. 1853, for the purpose of the hearing in the case of the Erie and Northeast Railroad Company *vs.* Casey, on 7th June next, the said Casey becoming responsible to the said prothonotary for the safety of them."

June 5th, 1856. Record and papers remaining of record in this office sent to Mr. Casey as directed by the Court.

July 17th, 1856. Complainants' bill of costs filed.

June 9th, 1856. Extract from the minutes from proth'y of the Western District filed in words following, to wit:—

And now, to wit, Sept. 7th, 1854, this cause came on to be heard on the bill of complaint, on the answer of the defendants, and on the

proofs and evidence taken by both parties, and was argued by counsel. And thereupon it appears to this Court that the defendants have built and do now use and maintain a certain railroad known as the Erie and Northeast Railroad, part of which said railroad is within the present limits of the City of Erie, and upon certain streets thereof. And another part of their road is on the bed of a certain public road known as the Buffalo Road, in Harbor Creek Township, Erie County, and that the said railroad in those parts thereof is a public and common nuisance. It is therefore ordered, adjudged, and decreed, that the defendants shall, on or before the expiration of four months from this date, break up so much of their said road as lies upon the said streets and upon the Buffalo Road, and remove the material thereof, so as to leave the said streets and roads in as good condition as they were in before the construction of said railroad.

And it is further declared and adjudged that the said defendants shall, within four months from this date, change the route and construction of their railroad accordingly, and make their western terminus at what was the eastern line of the said borough in 1842, or within the said borough. And the said defendants shall reconstruct their railroad to supply the parts hereby ordered to be broken up according to plans and specifications to be by them made, and to be submitted to and approved by this Court on full notice to the counsel of the commonwealth and not otherwise; and the defendants shall pay all lawful costs to be taxed by the prothonotary.

Opinion by Chief Justice Black.

Opinion by LOWRIE, J., filed. LEWIS, J., dissents.

October 3d, 1854. At a Supreme Court held in and for the Western District at the City of Erie, the Hon. John H. Walker, att'y for defendants, comes into Court and files of record plans of reconstruction of said road to supply the parts to be broken up as directed by order of Sept. 7th, 1854.

Oct. 5th, 1854. At a Supreme Court held at Erie, in and for the Western District, the Hon. James Thompson presented to the Court counter plans and exceptions to the plan and specifications, as filed by the respondents, and asks that they be filed, which was directed to be done. Same day Mr. Walker moves the Court to approve of the plans as filed by the company. Whereupon the Court grant a rule to show cause why the same should not be so approved, and by consent of parties appoint James Sill, Esq'r, Commissioner, to take testimony on behalf of the parties, complainant and respondent. It is further ordered that the argument on the rule to show cause be heard at Pittsburgh on Friday the 12th day of October next.

October 6, 1856. At a Supreme Court held at the City of Erie in the Western District of Pennsylvania, it was ordered that the Prothonotary of the Eastern District be and hereby is directed to certify

the record and proceedings in this case to the Prothonotary of the Western District without delay.

Oct. 12th, 1854. At a Supreme Court held at Pittsburgh, in and for the Western District of Pennsylvania. On motion of Mr. Walker and Mr. Thompson, attorneys for the parties, the hearing of this cause is postponed until Tuesday, October 24th inst., and the Court order the testimony taken by the parties to be printed.

October 24th, 1854. At Pittsburgh, argued by Mr. Walker for the defendants, and Mr. Thompson for the plaintiffs.

Oct. 25, 1854. Argued by Mr. Thompson for the plaintiffs, and by Mr. Stanton for defendants.

Jan'y 28th, 1856. Opinion by Judge Black filed.

I certify the above and foregoing to be a true and accurate copy of the docket entries in the above case. Witness my hand [SEAL.] and the seal of the Supreme Court of Pennsylvania for the Eastern District at Philadelphia, this fifth day of December, A. D. 1856.

J. F. BELSTERLING,
Pro Proth'y.

Bill for Injunction.

THE COMMONWEALTH OF PENNSYLVANIA, *ex relatione* Francis W. Hughes, Attorney-General,
vs.
THE ERIE AND NORTHEAST RAILROAD COMPANY.

In Equity.

To the Honorable the Judges of the Supreme Court of the State of Pennsylvania:—

The Commonwealth of Pennsylvania, by Francis W. Hughes, Attorney-General, in all humble manner showeth, that the Legislature of the State of Pennsylvania, on the twelfth day of April, in the year of our Lord one thousand eight hundred and forty-two, passed an Act, entitled "An Act to incorporate the Erie and Northeast Railroad Company, and for other purposes," all of which Act of Assembly, so far as it relates to the Erie and Northeast Railroad Company, and all its sections, supplements and parts of sections, supplements, and all other Acts of Assembly within their several sections, parts of sections and supplements, so far as the same relate to said Erie and Northeast Railroad Company, your petitioner prays may be taken and made a part of this his bill of complaint as fully and as largely as if the same were herein copied and fully set forth, and particularly the sixth section of said Act of Assembly, approved the twelfth day of April, one thousand eight hundred and forty-two, wherein it is enacted that "the president and managers of said company, by themselves or their agents, shall have power to construct a railroad from the borough of Erie to some point on the east bound-

ary line of the township of Northeast, in the county of Erie," etc.; and also the seventh section of said act, in which it is enacted that "the said railroad shall be so constructed as not to impede or obstruct the free use of any public road, street, lane, or bridge, now laid out, opened or built," etc.; and also the tenth "section of said act, in which it is enacted that if the company aforesaid do not complete the said work so as to bring it into use within ten years after the passage of this act, or after completion, shall suffer the road to go to decay and become impassable for the space of two years, then this charter shall become null and void."

Your petitioner further represents that the Legislature of said Commonwealth of Pennsylvania, on the eleventh day of March, in the year of our Lord one thousand eight hundred and fifty-one, passed an Act entitled "An Act fixing the gauges of railroads in the County of Erie," which your petitioner prays may be taken and made a part of this his bill of complaint as fully as if the same was copied and specifically set forth herein, in which it is enacted that the gauge or width of the track of any railroad running from the borough of Erie eastwardly, or eastwardly from a line drawn from the borough of Erie, southwardly to the Ohio River, shall be either six feet, or four feet eight and one-half inches.

Your petitioner further represents that the Legislature of Pennsylvania on the fourteenth day of April, in the year of our Lord one thousand eight hundred and fifty-two, passed an Act entitled *inter alia*, "An Act to change the mode of voting in the Erie and Northeast Railroad Company," the fourteenth section of which said act your petitioner prays may be taken and made a part of this bill of complaint as fully and entirely as if the same had been copied and specifically set forth herein, in which said section it is enacted and "provided that the said company shall not, by any vote of the stockholders or the directors thereof, change the gauge of said road from the gauges now established by the provisions of the act of eleventh of March, A. D. one thousand eight hundred and fifty-one, entitled 'an Act fixing the gauges of railroads in the county of Erie,' and the acceptance of this act shall be deemed an acceptance of the said act of eleventh March, one thousand eight hundred and fifty-one; and provided also that if any company owning, leasing, or using any railroad in said county of Erie, shall construct, alter, lease, or use any railroad of any other gauge of track, in any part of said county, east or west of the City of Erie, than is prescribed in the aforesaid act of eleventh of March, one thousand eight hundred and fifty-one, then, and in such case, all and singular the rights, powers, and privileges granted to such company by any Act of Assembly whatsoever, shall be adjudged null and void."

Your petitioner further represents to your honors, that on the eighteenth day of April, in the year of our Lord one thousand seven hundred and ninety-five, the Legislature of Pennsylvania passed an act entitled "an Act to provide for laying out and establishing towns

and out lots within the several tracts of land heretofore reserved for public uses, situated respectively at Presq' Isle, on Lake Erie, at the mouth of French Creek, at the mouth of Conewango Creek, and at Fort Le Bœuf," the first section of which said act provides for the laying out the town (now city) of Erie, with streets, lanes, and alleys in both the in lots and out lots, and further that "all the streets, lanes, and alleys thereof and of the out lots thereto adjoining, shall be and forever remain common highways," which said section, with all other parts of said act relating to the said town of Erie, and all supplements thereto, and sections and parts of sections, your petitioner prays may be taken and made a part of this his bill of complaint as fully as if the same had been copied and specifically set forth herein; and particularly the first and sixth sections of an Act of the Legislature of Pennsylvania, passed the twenty-ninth day of March, in the year one thousand eight hundred and five, entitled "An Act to erect the town of Erie, in the County of Erie, into a borough, and for other purposes." Also the first, sixth, and ninth sections of an Act of the Legislature of the Commonwealth of Pennsylvania, passed the eighth day of April, in the year of our Lord one thousand eight hundred and thirty three, entitled "An Act to alter an act entitled 'An Act to erect the town of Erie, in the County of Erie, into a Borough.'" And to erect Waterford and Wattsburgh in said counties into Boroughs. Also so much of an act passed the fourteenth day of April, one thousand eight hundred and fifty-one, entitled *inter alia*, "An Act to incorporate the City of Erie," etc. as relates to said city, and the powers conferred upon her, and upon her Mayor and Councils.

Your orator charges, that the said Erie and Northeast Railroad Company have not yet completed, built, and constructed a railroad from (what was the borough of Erie at the date of the passage of the act under which they claim to construct said road) to the east line of the township of Northeast, although the ten years in which said road, according to the provisions of said act of Assembly of April 12, 1842, was to be so completed, have long since expired.

Your orator further charges that the said Erie and Northeast Railroad Company have constructed a railroad from a point at the distance sixty rods south from the (then) borough of Erie to the east line of the township of Northeast, in said county of Erie; and that said company have so constructed said railroad that it uses and occupies Penn Street and Ritner Street, in said city of Erie, entirely and to the total and entire exclusion of any and all travel and occupancy of the same by the good people of this Commonwealth, and that the said railroad is a public nuisance in said streets, endangering the lives and property of all good citizens who attempt to travel upon or occupy them.

Said railroad also crosses Peach Street, Turnpike Street, State Street, French Street, Holland Street, German Street, Parade Street and Ash Lane, in said city of Erie, in such a manner as to hinder

and obstruct the travel on said streets, and is a common nuisance, therein endangering the lives of citizens, and destructive to property thereupon; all of which said streets were laid out before the passage of the act of April 12th, 1842, and long before the building of said railroad. Said railroad crosses State Street, in said city of Erie, by means of a bridge, at the height of thirteen feet, with bents only nineteen feet apart, constructed with braces extending down said bents or posts the distance of seven feet, and braces extending from the bottom upwards. And the passage-way of the street is confined to the distance between two bents, to wit, to the distance of nineteen feet, not affording sufficient room for two loaded teams to pass each other at that point, State Street being the principal street of the city. The crossing of the railroad over French Street is by a bridge of the height of only nine feet, with a passage-way between the bents of only nineteen feet, it being so low that the passage of teams with bulky loads is entirely prevented, to the great injury, detriment and annoyance of all good citizens of the Commonwealth. The passage or crossing of said railroad over Holland Street is by an embankment of about two feet high, with a ditch on either side of the depth of two feet, absolutely and entirely precluding and preventing any and all travel on said street. The crossing of said railroad over German Street and Parade Street is by embankments of fourteen inches or more in height, hindering and endangering travel on said streets.

Your orator further charges that the said railroad is built and constructed through the township of Harborcreek, in said county of Erie, and also the township of Northeast, and a portion of the township of Millcreek, and in said distance runs across and along and obstructs several public roads in said townships, and particularly the road known as the Buffalo road, in the township of Harborcreek aforesaid, which said road is occupied by the railroad for the distance of eighty rods in one place, and for the distance of forty rods in another place, to the great danger, nuisance, hindrance and damage of all persons and property travelling along said highway. That for the distance of forty rods in one place, the public road aforesaid is occupied entirely and absolutely by said railroad, to the exclusion of any and all other occupancy, the said railroad company having taken full, entire and complete possession of said public road, and erected an embankment therein, compelling the citizens and all other persons travelling along said Buffalo road to leave and abandon said road, and to pass over and across the land and private property of others, and not along the public road.

Your orator further charges that the occupancy of said Buffalo road and of the streets of the city of Erie is in violation of the charter of said railroad company, and of the rights of the Commonwealth and citizens; that the said railroad could have been, and should have been built, erected and constructed by another and different route from the east line of the township of Northeast to the borough of

Erie, by which, for a distance of at least eight miles of the western end of said railroad, should have been located and constructed north of where it is now built, by which route or line it would have reached the harbor of Erie by such courses and distances as would not have occupied or interfered with the public road in the township of Harborcreek, or crossed or occupied the public streets in the city of Erie in such a manner as would have been an obstruction or a nuisance to them, or the free passage thereof; that said road could have been built in said location by easy grades and at a small expense, and afforded facilities for shipping and transshipping goods and freight from and to the lake; whereas the present location of the said railroad and depot is at the distance of one and one half miles from the lake and harbor, to the great injury of the Commonwealth, and citizens and commerce thereof.

Your orator further charges that said Erie and Northeast Railroad Company, by a vote of the stockholders, did; on or about the 15th day of January, 1853, accept of the act of the eleventh day of April, 1851, hereinbefore referred to, and make the same a part of their charter and fundamental law of their organization and being, by acting under and adopting the fourteenth section of the act of Assembly of April 14, 1852; and that said Erie and Northeast Railroad Company did exercise and enjoy the privileges conferred by said last mentioned section, and vote under and by virtue of said section at their last annual election for a Board of Directors. Yet, notwithstanding their contract by them made, in the acceptance of said acts of 11th April, 1851, and the 14th section of the act of April 14, 1853, the said Erie and Northeast Railroad Company, in violation of the same did, on the seventh day of December, A. D. one thousand eight hundred and fifty-three, proceed to take up the track of their Railroad, which was and had been of the width of six feet, and did lay down the said track over and upon their said road of the width of four feet and ten inches.

Your orator further charges that the said Erie and Northeast Railroad Company did contract and agree to and with the various persons from whom said railroad company purchased the right of way on which to erect and lay down their said roads, that the said road should be and remain a tract of the width of six feet between the rails, and that said agreement constituted a part of the consideration for which said land and right of way was sold; notwithstanding which said railroad company changed their track as before mentioned and charged.

Your orator further charges, that the said Erie and Northeast Railroad Company hath in violation of law and contrary to equity and good conscience, and to the great injury of the interests of the Commonwealth, on some day to your orator unknown, made, entered into, and formed a contract with the Buffalo and State Line Railroad Company, a corporation claiming to be chartered by the laws of the State of New York, by which arrangements the said Erie and North-

east Railroad Company and the Buffalo and State Line Railroad Company become one and the same corporation, with unity of interest, and that interest opposed to the good and welfare of the Commonwealth of Pennsylvania; and by which said contract the said Railroad from Erie to Buffalo was to be stocked, and now used and occupied jointly by the said railroad companies, and the profits thereof jointly divided.

Your orator further charges, that the said Erie and Northeast Railroad Company, well knowing that they had no legal right or authority to locate, build, erect or construct the said railroad within the city of Erie, and across and along its streets, did apply before they had built and constructed the same, to wit, in the month of November, 1851, to the Mayor and Select and Common Councils of said city, for the privilege to erect, build, and construct said railroad within the limits of said city, and across and along the streets: and the said Mayor and Select and Common Councils did, by resolution, passed the 10th day of November, A. D. 1851, resolve to allow said railroad company to construct and erect the same in said city, and across and along the streets of the same; and the said railroad so to remain until the said Mayor, Select and Common Councils should be of the opinion that the same was injurious to the interests and welfare of said city, and the citizens thereof; and the said Mayor and Select and Common Councils did resolve, on the 28th day of November, A. D. 1853, that the said railroad, so located across the streets of said city, was a nuisance and great injury to said city, and to the citizens thereof, and did, by her proper officers, there and then give notice of the same to the said railroad company, and require them to remove their said railroad from the said city, and from the streets, lanes, and alleys thereof, which said notice the said railroad company disregarded, and entirely and absolutely refused to comply with the same, and with their compact and agreement made with the said city by them at laying down the same; and the said the Mayor and Select and Common Council of said city did, by ordinances duly enacted, on the nineteenth day of July, and on the 28th day of November, in the year 1853, authorize, command, and instruct the high constable of said city, with his aids and workmen, to remove the same from the streets of the city, which said resolutions of November 10th, 1851, and November, 1853, and the ordinances of July 19th, and November 28th, 1853, your orator prays may be taken and made a part of this his bill of complaint as fully as if the same were herein copied and specially set forth.

And your orator further charges that any and all right and privileges that were or could have been granted by the Mayor and Select and Common Councils to the said Erie and Northeast Railroad Company, allowing them or authorizing them to use and occupy the streets of the city of Erie, were and are entirely and absolutely null and void, and of no effect, as the said Mayor and Common Council were acting in so doing without authority, the right to occupy and

pass over the streets being vested in the citizens of the whole Commonwealth, the said streets, lanes, and alleys being by the Act of the Commonwealth made public highways forever.

All of which doings, actings, and pretences of the said Erie and Northeast Railroad Company are contrary to equity and good conscience, and tend to the manifest injury, wrong, and oppression of your orator in the premises. In consideration whereof, and forasmuch as your orator is entirely remediless in the premises according to the strict rules of the common law, and can only have relief in a Court of Equity, where matters of this nature are properly cognizable. To the end, therefore, that the said Erie and Northeast Railroad Company may by her President, John A. Tracy, and John H. Walker, Prescott, Metcalf, Milton Cartright, Dean Richmond, Andrew Scott, and John Brawley, her Board of Directors, upon their respective corporal oaths, full, true, direct and perfect answer make, to all and singular the matters hereinbefore stated and charged as fully and particularly as if the same were hereinafter repeated, and they thereunto distinctly interrogated, and that not only as to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay, and belief, and more especially that they may answer and set forth whether—

The matters in the foregoing bill against them alleged are not correct and true.

Second. By what authority they occupy and claim to occupy the public road in the township of Harbor-creek, Erie County, Pennsylvania.

Third. By what authority they claim to occupy and cross the streets in the City of Erie.

Fourth. By what authority they claim to build, erect and construct, and have built and constructed, their railroad into the City of Erie.

Fifth. Whether the said Erie and Northeast Railroad has ever been built, constructed and erected to the Borough (or what was the borough) of Erie, as it was at the passage of the law under which defendants claim to build their railroad.

Sixth. Whether the better place to have erected and constructed said road was not to the lake and harbor at Erie, and whether it was not expressly agreed by the company to erect and construct the same to the docks, harbor and lake.

Seventh. Whether the said railroad company, by a vote of her stockholders, did not, on the day of January, A. D. 1853, accept and make act of Assembly of the eleventh day of April, 1851, and the 14th section of the act of 14th April, 1852, a part of their charter and the fundamental law of their organization, and acted under the same since their adoption.

Eighth. Whether said Erie and Northeast Railroad Company have not formed a contract and running arrangements with the Buffalo

and State Line Railroad Company, by which the said road was to be now used and occupied jointly by the said two railroad companies, and the profits of the said road to be jointly used and divided in proportion to the capital stock of each road, or in some other manner, and now, please annex a full and entire copy of said contract to your answer to this interrogation.

May it please your honors to grant to your orator the most gracious writ of subpœna of the Commonwealth of Pennsylvania, to be directed to the said Erie and Northeast Railroad Company, and to the President and Directors thereof, commanding them and every of them, at a certain day, and under a certain pain therein to be specified, to be and appear before your honors in this honorable Court, and there to answer all and singular the premises, and to stand to, perform and abide such order and decree therein, as to your honors may seem meet.

And may it please your honors to grant to your orator also, the most gracious writ of injunction to restrain the said Erie and Northeast Railroad Company from using, occupying and running their said railroad; and particularly that they may be especially restrained from running across and along, and from using and occupying the Buffalo road in the township of Harbor-creek, in the County of Erie, as hereinbefore described, and also from running into and across and along the streets of the City of Erie, and that upon a final hearing they may be perpetually enjoined from using the public roads and streets, and occupying the same with their said railroads, and as in duty bound will ever pray, etc.

FRANCIS W. HUGHES,
Attorney General.

STATE OF PENNSYLVANIA,
Erie County, ss.

Alfred King, after being duly sworn, deposes and says that the facts set forth in the foregoing bill are true in substance and in fact, to the best of his knowledge and belief.

A. KING.

Sworn to and subscribed before me,

WILSON LAIRD,
Justice of Peace.

The defendants are required to answer the foregoing interrogatories, numbers 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10.

JAMES THOMPSON,
BENJAMIN GRANT,
Of Counsel for Complainants.

Exhibits of Acts of Assembly and Ordinances referred to in the Bill of Complainants.

Sixth, 7th, and 10th sections of the act incorporating the Erie and Northeast Railroad Company. Pamp. Laws of 1842, p. 267.

Sec. 6. The President and Managers of said company, by themselves or their agents, shall have power to construct a railroad from the borough of Erie to some point on the east boundary line of the township of Northeast, in the county of Erie, and for this purpose the said company shall have power, by themselves or their agents, to enter in and upon, and to occupy any land on which the said railroad may be located, or which may be necessary for the use of the said company, and thereon to construct said road, with its necessary buildings and fixtures, and likewise to construct any bridge or bridges across any navigable stream, not obstructing the same, and the said company shall pay, or satisfy the owner of such land so taken, &c. (The remainder of the section not material, as it relates to the mode of making compensation to owners of property through which the road may run.)

Sec. 7. The said railroad shall be so constructed as not to impede or obstruct the free use of any public road, street, lane, or bridge now laid out, opened, or built, nor to interfere with any burial ground, dwelling-house, or building, without the consent of the owner, and where the said road severs the lands of any person or persons, the company shall be required to erect and maintain good and convenient crossings, either by bridges, or otherwise, where the same may be necessary.

Sec. 10. If the company aforesaid do not complete the said work so as to bring it into use within ten years after the passage of this act, or after completion, shall suffer the road to go to decay, or become impassable for the space of ten years, then this charter shall become null and void.

The act "fixing the gauges of railroads in the county of Erie of 11th of March, 1851. Pamp. Laws of 1851, page 155.

Sec. 1. That the gauge or width between the rails of any track of any railroad running from the borough of Erie, in the county of Erie, westwardly to the Ohio State line, or of any railroad which shall or may be located between a line running due south from the town of Erie to the Ohio river and the Ohio State line, or of any railroad, any part of which shall or may be used in connecting any railroad leading eastwardly from the town of Erie, or from any point in the aforesaid due south line, with any railroad leading westwardly to the Ohio State line, for the construction of which, or either of which, a company is, or may hereafter be incorporated by the laws of this commonwealth, shall be of the width of four feet ten inches and no other.

Sec. 2. That the gauge of any railroad running from the New York State line westwardly, shall, as far as the town of Erie, or as far as the line running due south from the town of Erie to the Ohio River, be constructed either of the gauge of six feet, or of the gauge of four feet eight and one-half inches, &c. (Proviso not material.)

The act of 14th April, 1852. Pamp. Laws, pp. 344–45.

Sec. 14. This section regulates the manner of voting by the stockholders of the Erie and Northeast Railroad Company. The 1st and 3d provisos are material, and are as follows:—

"Provided, That no person holding shares by transfer shall be entitled to vote, unless the same shall have been transferred on the books of the company at least three months before the election, nor shall any proxy be received, or entitle the holder to vote, unless the same shall bear date and have been duly executed within three months next preceding such election." * * * *

"Provided, That said company shall not, by any vote of the stockholders, or the directors thereof, change the gauge of said road from the gauges now established by the provisions of 11th of March, A. D. 1851, entitled 'An act fixing the gauges of railroads in Erie County,' and the acceptance of this act shall be deemed an acceptance of the said act of 11th March, 1851."

The act of 18th April, 1795. "An act to provide for laying out and establishing town and out lots within the several tracts of land heretofore reserved for public uses, situated respectively at Presqu' Isle, on Lake Erie," &c. 3 Smith's Laws, pp. 233–34.

Sec. 1. That the governor may, and shall appoint two commissioners to survey, or cause to be surveyed 1,600 acres of land for town lots, and 3,400 of land adjoining thereto for out lots, at or near to Presqu' Isle, on Lake Erie, within the tract heretofore reserved for public use in and by an act, entitled "An act for the sale of the vacant lands within this commonwealth, passed on the third day of April, 1792; and the said land so surveyed shall respectively be laid out into a town lots and out lots, in such manner and with such streets, not more than one hundred, and not less than sixty feet wide, and such lanes, alleys, and reservations for public uses as the said commissioners shall direct; but no town lot shall contain more than one-third of an acre, no *out* lot shall contain more than five acres, nor shall the reservations for public uses exceed in the whole twenty acres; and the town hereby directed to be laid out, shall be called "Erie," and all the streets, lanes, and alleys thereof, and of the out lots thereto adjoining, shall forever remain common highways.

The remaining sections regulate the sale and conveyance of the town lots, &c.

The act of 8th April, 1833. An act to alter an act, entitled, "An act to erect the town of Erie, in the County of Erie, into a borough," &c. Pamp. Laws of 1832, 3, p. 275.

Sec. 6 declares the borough of Erie to be a body corporate, its style, and immunities, and privileges, and need not be further set out.

Sec. 9. That it shall be the duty of the burgess and town council to meet as often as occasion may require, at which meetings the burgess shall preside, and in case of an equal division of the council, give the casting vote; and five members of the council, or four with the burgess, shall constitute a quorum, to transact business; and the burgess and counsel shall have power, at such meetings, to ordain and enact, revise, repeal, and amend, all such ordinances, by laws, rules, and regulations, as shall be deemed expedient to promote the peace, good order, benefit, and accommodation, of the citizens of said borough; to designate the width of side walks; to provide for the regulation of the markets; improve, *repair, and keep in good order, the streets, alleys, side walks, and public square, and public grounds, in said borough;* to regulate the depth of vaults, sinks, drains, and pits for privies; make permanent rules for the foundations of buildings and party walls; regulate the fences, side posts, and railings, along the streets, the public square and public grounds, and to prohibit and remove all obstructions and nuisances in said borough, &c. [The remainder of the section contains the enumeration of the powers and duties of the burgess and town council, and is not material.]

Act of 14th April, 1851. "An act to incorporate the City of Erie," &c. Pamp. Laws of 1851, p. 631. Sections 1 and 2 are all that are important to be set forth here.

Sect. 1. That the borough of Erie, in the county of Erie, as the same extends and is now incorporated, be and the same is hereby constituted a city, by the name and title of "The City of Erie," and by the said name shall be hereafter designated, and the inhabitants thereof by the same name are hereby constituted a body corporate and politic with the incidents of a corporation.

Sect. 2. That the said Select and Common Councils shall have power to compel the owners or occupiers of lots to repair the side walks in front of their respective lots, or cause the repairs to be made, and file their lien therefor, in the same manner as the Burgess and Town Councils were authorized to do, in the original construction of such pavements. And the said Select and Common Councils may, by general ordinances, regulate the portion of the side walk which the owners of dwelling-houses and others may use for door steps and other proper purposes in front of their respective premises, and may impose penalties for mutilating or injuring trees growing upon the streets and public grounds of said city. And the Councils shall be vested with all the powers in said city which at, and imme-

diately before the passage of this act, belonged to and was vested in the Burgess and Town Council of the borough of Erie.

The following preamble and resolutions passed the Select and Common Councils of the City of Erie, the 10th day of November, A. D. 1851, viz:—

Whereas, the President and Directors of the Erie and Northeast Railroad Company have applied for leave to lay down a track of said road on the north side of Penn Street, and two or three tracks on Ritner Street, for the purpose of giving them access to their wood house, on Penn Street, by trains, and for the purpose of enabling them to break up long trains coming into the city, and back their cars on to the north part of their depot lot, therefore,

Resolved, by the Select and Common Council of the City of Erie, That, as far as the Mayor, Select and Common Councils, have legal power and authority in the premises, the privilege asked for, as aforesaid, be, and the same is hereby granted, upon condition, however, that the said track be so laid and used as to present the least possible obstruction to the ordinary travel and business of the streets, and placed as directed by the Council, and good planking to be substantially built and kept in repair, both inside and outside of said tracks, by the said railroad company.

Resolved further, That the said privilege is granted upon the express condition that said city shall not be liable in any form or manner for the damage which any individual may in any way sustain by reason of the laying down or use of said railroad track, but all such damage (if any) shall be paid by the Company.

Resolved further, That the Select and Common Councils reserve the right to withdraw the privilege granted provided the use and occupancy thereof shall appear to them to be injurious to the interests and welfare of said city.

The following preamble and resolutions passed the Select and Common Councils on the 28th day of November, A. D. 1853, viz:

Whereas, A preamble and resolutions passed the Select and Common Councils the 10th day of November, A. D. 1851, granting to the Erie and Northeast Railroad Company the privilege of laying down a track of said road on the north side of Penn street, and two or three tracks on Ritner street, so far as said Councils had legal power and authority in the premises, on certain conditions therein set forth. And whereas, the following is one of the said resolutions, to wit: "Resolved further, That the Select and Common Councils reserve the right to withdraw the privilege hereby granted, provided the use and occupancy thereof shall appear to them to be injurious to the interests and welfare of said city. And whereas it now appears to the Select and Common Councils that the use and occupancy of said streets by *the said Railroad Company as now managed*, is injurious to the interests and welfare of the city; therefore,

Resolved by the Select and Common Councils of the city of Erie, That the resolutions passed the 10th day of November, A. D. 1851, granting the Erie and Northeast Railroad Company the privilege of laying a track of said road on the north side of Penn street and two or three tracks on Ritner street, be, and the same are hereby rescinded and repealed, and all rights and privileges thereby granted are hereby withdrawn, annulled and made void.

Resolved, That a copy of this preamble and resolutions be signed by the Mayor and Clerks, and sealed with the city seal, and delivered forthwith by the high constable to the President of the said Railroad Company, or one of their officers.

The above and foregoing is a true copy of the preamble and resolutions passed by the Select and Common Councils the dates above written.

In witness whereof, I hereunto set my hand and affix the corporate seal of the city of Erie, this 20th day of December, A. D. 1853.

[SEAL.] W. H. SHERMAN,
Clerk Select Council.

An ordinance prohibiting the alteration of Railroad Gauges of 19th of July, 1853.

Whereas, By their Act of Incorporation the Councils of the city of Erie are empowered and required to ordain and enact all such by-laws, rules and regulations as shall be deemed expedient to promote the good order and benefit of the citizens thereof; to regulate, improve and keep in order the streets, and to remove therefrom all obstructions: And whereas, Two Railroads, the "Erie and Northeast," and the "Franklin Canal Company's Railroad," of diverse gauges and width of tracks, enter into and meet in said city—the gauge of the track of the former being six feet, and that of the latter four feet ten inches: And whereas, the good order and benefit of said citizens, and the proper regulation of said streets, require that there should be no change in said respective gauges, except as hereinafter provided; therefore,

First. Be it ordained and enacted by the Select and Common Councils of the City of Erie, and it is hereby enacted by the authority of the same, That the said Erie and Northeast Railroad Company is hereby prohibited from putting down or using any other gauge or width of track, or using any cars or locomotive engine of any other width of gauge of wheels than six feet; and the said Franklin Canal Company are hereby prohibited from putting down or using any other width of gauge or track, or using any other cars or locomotive engines of any other width or gauge of wheels than four feet ten inches in said city, under the penalty of five hundred dollars for every such offence, and under an additional penalty of five hundred dollars per day for each day that any track put down or used in violation of this ordinance, shall be suffered to remain, or car or locomotive used after prosecution for the first or any subsequent

offence; *Provided the Erie and Northeast Railroad Company may, if they deem it expedient so to do, put down and use in said city, a track of the width or gauge of four feet eight inches and a half, with cars and locomotives to exactly correspond, anything herein contained to the contrary notwithstanding.*

Second. In case any railroad track shall be put down on, or across any of the streets of this city, in violation of the provisions of this ordinance, the high constable is hereby authorized and required to cause the same to be forthwith removed off of such street or streets, and he is hereby authorized and required to employ a sufficient force for that purpose.

Third. Each and every resident of this city is hereby, on request by the high constable, required, under the penalty of five dollars for every neglect or refusal to aid him in the discharge of the duties hereinbefore enjoined upon him; and all persons are hereby prohibited, under the penalty of one hundred dollars for every offence, from resisting or obstructing the high constable, or any person called to his aid, in discharge of the duties above enjoined.

Fourth. Nothing herein contained shall confer or be construed as conferring any rights to construct or maintain in said city, upon or across any of the streets thereof, any railroad track, for the construction and maintenance of which a legal authority does not exist independent of this ordinance.

Ordained and enacted into an ordinance, this 19th day of July, A. D. 1853.

Attest: A. KING,
Mayor.

W. H. SHERMAN,
Clerk Select Council.

W. THORNTON,
Clerk Common Council.

I, W. H. Sherman, Clerk of the Select Council of the City of Erie, do hereby certify that the above and foregoing is a true copy of an ordinance ordained and enacted by the Mayor, Select and Common Councils the date above written.

In witness whereof I hereunto set my hand and affix the corporate seal of the City of Erie, this 20th day of December, 1853.

[SEAL.] W. H. SHERMAN,
Clerk Select Council.

Ordinance to abate Nuisances caused by the Railroads, of 28th November, 1853.

Whereas, the Franklin Canal Company and the Erie and the Northeast Railroad Company have respectively caused to be placed upon, over, and across divers of the public streets of the City of

Erie, certain iron rails for railroad tracks, and certain bridges, embankments, ditches, timbers, and other erections and constructions, all of which are without authority of law, and obstruct the free use of said streets respectively as public highways; therefore,

First, Be it ordained and enacted by the Select and Common Councils of the City of Erie, and it is hereby ordained and enacted by the authority of the same, That the Mayor of said city be and he is hereby authorized and empowered to issue his order to the high constable of the same, directing him to remove from such streets, or any of them, all or any of such track or tracks, bridge or bridges, embankments, ditches, timbers, erections and constructions whatever, or any part thereof, by whomsoever made or caused. And the high constable, upon the receipt of such order, is hereby required forthwith to carry the same into effect, and to employ a sufficient force for that purpose.

Second. Any person who shall in any manner obstruct or resist the high constable in carrying such orders into effect, or shall replace, or aid in replacing any such track, bridge, embankment, ditch, timber, or other erection or construction upon or over any of said streets after the same shall have been removed as aforesaid, shall forfeit and pay to the use of the city a penalty of ninety dollars for every such offence.

Third. That all privileges or grants of privilege (if any exist), to any railroad company to place or maintain any track, bridge, embankment, ditch, timber or other erection or construction upon, over, or across any street of this city, are hereby annulled and revoked, and the placing or maintaining of any such thereon forbidden.

Ordained and enacted this 28th day November, A. D. 1853.

Attest: A. KING,
Mayor.

W. H. SHERMAN,
Clerk Select Council.

W. THORNTON,
Clerk Common Council.

I hereby certify that the above is a true copy of an ordinance ordained and enacted by the Mayor and Councils of the City of Erie the date above written.

Witness my hand and the seal of the city, this 20th day of December, A. D. 1853.

[L. S.] W. H. SHERMAN,
Clerk Select Council.

THE COMMONWEALTH OF PENNSYLVANIA, ex rel. FRANCIS HUGHES, Attorney General,
vs.
THE ERIE AND NORTHEAST RAILROAD COMPANY.

Supreme Court, In Equity. December T., 1853. No. 7.

The demurrer and answer of the Erie and Northeast Railroad Company to the Bill of Complaint of the Commonwealth of Pennsylvania.

To so much of the bill as claims discovery and an injunction, by reason that the said company have not duly completed their said road within the time specified in their charter—and to so much as claims discovery and an injunction by reason that the road does not extend to the borough of Erie, as the boundaries of the same were established on the twelfth day of April, 1842—and to so much of the bill as claims discovery and an injunction by reason of the making and entering into any contract with the Buffalo and State Line Railroad Company—and to so much of the bill as claims discovery and an injunction by reason of any alleged agreement with any landowners to maintain the said railroad with a track of the width of six feet—they claim the same benefit as though they had formally demurred to each and every of such charges and averments, and do hereby demur thereto.

And these respondents, without waiver thereof, or of any insufficiency in form or substance in the said bill of complaint, for answer thereto or so much thereof as they are advised it is material to answer, say:

That it is true that upon the 12th day of April, 1842, there was approved by the governor, an act entitled "An act to incorporate the Erie and Northeast Railroad Company, and for other purposes, and that afterwards, in pursuance thereof, and upon due compliance with all the provisions in said act specified and required, letters patent were, upon the 16th February, 1846, duly issued, whereof a copy is annexed as an exhibit to this answer, marked A, whereby the subscribers to the stock therein mentioned, and all who should thereafter subscribe, were erected and created a body politic, by the name, style, and title of the Erie and Northeast Railroad Company.

That there was thereby created the said corporation named as defendants in this bill, and that they possess all the powers, franchises, and privileges by the said act, and by all supplements thereto duly passed, granted, and conferred.

That in and by the said act of assembly, the said defendants had power to construct a railroad from the Borough of Erie to some point on the eastern boundary line of the township of Northeast, in the County of Erie; that in pursuance thereof, they did, in the year 1849, commence the erection and construction of the said railroad,

from the borough of Erie to a point on the east boundary line of the township of Northeast, in the County of Erie, as hereinafter mentioned and particularly described, and completed the same so as to bring it into use as hereinafter stated; on the 8th January, 1852, within ten years after the passage of the act authorizing their incorporation as aforesaid.

That the cost of the said road so constructed, equals the sum of about $750,000. And that the course of said road is in a straight line to within about two miles of the eastern line of Northeast township, and is in all respects well built, and affords a useful and convenient channel of commerce, and for the conveyance and transport of passengers and freight.

That it is true that a bill, passed by the Legislature of Pennsylvania, was approved the 11th March, 1851, entitled "An Act fixing the gauges of railroads in the county of Erie," whereby it was enacted as by said act will appear.

That it is true that an act passed by the Legislature of Pennsylvenia, approved the 14th day of April, 1852, entitled, *inter alia*, "An Act to change the mode of voting in the Erie and Northeast Railroad Company," as by said act will appear, and that the same was duly accepted by these respondents, according to law and to the provisions thereof.

That it is true that the Legislature of Pennsylvania did pass an act, approved the 18th of April, 1795, entitled "An Act to provide for laying out and establishing towns and out-lots within the several tracts of land heretofore reserved for public uses, situated respectively at Presq' Isle, on Lake Erie, at the mouth of French Creek, at the mouth of Conewango Creek, and at Fort Le Bœuf." And did also pass an act, approved the 29th day of March, 1805, entitled "An Act to erect the town of Erie, in the County of Erie, into a borough, and for other purposes," whereby it was enacted as will thereby appear. And did also pass an act approved the 8th day of April, 1833, entitled "An Act to alter an act, entitled 'An Act to erect the town of Erie, in the County of Erie, into a borough,' and to erect Waterford and Wattsburgh, in said County, into boroughs," whereby it was enacted as by said act will appear.

And that there was passed an act, approved 14th April, 1851, entitled *inter alia*, "An Act to incorporate the City of Erie," etc., whereby was enacted as will thereby appear.

And as to the charge in said bill, that the Erie and Northeast Railroad Company, have not yet completed, built and constructed their road in accordance with the provisions of the said act of Assembly, of April 12, 1842, incorporating them, these respondents aver and say:—

That at the time of the passage of said act, to wit, on the 12th of April, 1842, the boundaries of the borough of Erie were defined and described by the first section of the act passed the 29th of March, 1805, as follows, to wit: By the east side of Parade Street, the

south side of Twelfth Street, the west side of Chestnut Street and Lake Erie; which streets of the town of Erie and the lake, were by the act aforesaid, established as the boundaries of said borough. A copy of which act is hereto annexed, and made part of this answer, marked B, and which boundaries are marked and designated on a map of Erie, by a colored line, and which map is made an exhibit, and filed with this answer marked C.

That afterwards and before the commencement of the said railroad, by an act approved the 10th of April, 1848, entitled an act *inter alia* "to *extend* the boundaries of the Borough of Erie," and by the third section thereof, the boundaries of said borough were extended east beyond Parade Street to Ash Lane; south beyond Twelfth Street to the southern boundary of a tier of out-lots; west beyond Chestnut Street to Liberty Lane, and on the north so as to include Presque Isle, as described in the third section of said act, which is annexed as an exhibit marked "B. B.," and made part of this answer; and which said extended boundaries established by said act as the boundaries of the Borough of Erie, are marked and designated on the aforesaid map C., by colored lines.

And that in 1849, after the boundaries of the Borough of Erie had been so extended, and the said Erie and Northeast Railroad was located, and the company commenced its construction, and completed the same from the Borough of Erie to a point on the east boundary line of the Township of Northeast, in the County of Erie, and have used and maintained the same within the limits of the Borough of Erie as so extended; the said road having been completed so as to be brought into use within ten years after the passage of the act of incorporation, to wit, on the 8th of January, A. D. 1852.

And as to the charge of said bill, that the said company have constructed a railroad from a point at the distance of sixty rods south from the Borough of Erie, and have so constructed the same that it uses and occupies Penn Street and Ritner street entirely, and to the total and entire exclusion of any and all travel, and that the same is a public nuisance in said streets, endangering lives and property. These respondents further answering, aver and say:—

That they do not use and occupy Penn Street and Ritner Street, or either of them entirely, and to the total and entire exclusion of any and all travel, and that their road is not a public nuisance in said streets, endangering lives and property.

And these defendants further say that they do not occupy any part of Ritner Street. As to Penn Street, that the same is a cross street 660 feet long or thereabouts, and 60 feet wide, extending between Peach Street and Sassafras Street, the lots on which, at the time the road was constructed, were generally vacant and unimproved.

Upon it the track of the company is laid at its present grade about 400 feet in length.

This street was dedicated by the owners of the outlots through which it passes. It was never graded by the City of Erie, and was

used very little, if at all, at the time of the location of the road. The rails are carefully laid down, so as to avoid, as far as possible, every obstruction or inconvenience to travel, and the road way is well planked over, so as to afford safe and convenient crossing. But the street was never graded by the city or regulated for public use. Whenever it shall be graded, the railroad will be no appreciable obstruction to the free use of the said street, and the same may be safely used without danger to life or property.

As to Peach Street and Turnpike Street, they are crossed by the track of the road at or near grade, and the track causes no appreciable obstruction to the free use of said streets.

As to State Street, it is crossed by the track upon a bridge erected over the street, at an elevation that avoids obstruction and allows the free use of said street. Where the railroad crosses there is a deep ravine, through which Mill Creek flows. The bridge was erected with spans 18 feet 6 inches high, and 19 feet wide in the clear. The street was not graded nor used. The Erie and Waterford Plank Road was afterwards located along said street, passing under the bridge, and in its constructian the street or plank road way was raised about five feet, leaving between it and the bridge a clear headway of about 13 feet.

No other part of the street where the railroad crosses is used, but it is a broken ravine and creek bottom, over which the creek flows. No complaint of obstruction has ever been made by the Waterford and Erie Plank Road. The space is ample for passing, being as wide as the said plank road.

French Street is crossed upon a bridge in the outskirts of the city, where the lots were generally vacant and unimproved, and the street was not much used.

When the railroad was located, the natural surface of the ground at the point of crossing was of the same elevation as the general surface of the plain on which the said road was laid. Proceeding northwardly from this point of crossing, the street descended abruptly into the valley of Mill Creek, which is at this place about twenty feet below the general surface of the plain. It was at first proposed to raise the grade of the street at this point about two feet, so as to make it conform to that of the railroad, and admit a crossing at grade. The citizens of Erie and others, interested in the use of the street, in consideration of the peculiar formation of the ground, preferred that the street should be cut down, so as to make the descent into the valley of Mill Creek more gradual, and permit the railroad to cross over the street on a bridge. This plan was approved by all persons interested therein, and the street was cut down by the company, and a bridge erected for their road, leaving a headway of nine feet six inches in the clear for the street. It might be further cut down, so as to leave an additional space if required.

Holland Street, where the railroad crosses, was a wet, low piece of ground, and unfit for use as a street without grading; and in order

to make it fit for use and travel, it would be necessary to raise and elevate it. Where the railroad crosses, it was raised about as high as would be required for its convenient use by the public. When it is graded, at such time as the improvements of property at that point shall justify it, the crossing will be at grade. The crossing is not now an obstruction to the free use of the street, because the street at that point is, from the nature of the ground and want of grading, unfit for use; and when the street is graded it will not be an obstruction, because the crossing will be at grade.

German Street is also a low, wet piece of ground where it is crossed by the railroad, and, when graded, will have to be elevated, so as to render it fit for use, to about the grade of the railroad track, and will then be crossed at grade. It has never been used where it is crossed, and, for the reason above stated, the railroad is not now any appreciable obstruction to its free use, and will not be when the street shall be graded.

Parade Street was also naturally a low piece of wet ground like Holland and German Streets, but it had been raised, graded, and used. The railroad crosses at grade, and the street is planked. The Erie and Wattsburgh Plank Road, occupies the street where it is crossed by the railroad, and the crossing makes no appreciable obstruction in the free use of said street.

Ash Lane is the eastern boundary of the city, is thirty feet in width; no buildings are near the crossing, it is very little used, and is crossed at or near grade, so as not to obstruct the free use of said lane.

These streets, to wit, Holland, German, Parade, and Ash lane are all crossed by the railroad at right angles near the outskirts of the city, the lots bounding thereon being generally vacant and unimproved. Very little travel has occasion to pass where the railroad crosses them, except on Parade Street, which is used by the Erie and Wattsburg Plank Road Company, and is crossed by the railroad at a safe convenient crossing at grade. The crossings are not nor are any of them any appreciable injury to the streets of said city nor obstruction to the free use thereof. They are no nuisance, and do not endanger either life or property. The railroad could not have entered the city limits without crossing streets; and streets could not have been here crossed at more safe and convenient points or in a more safe and convenient manner. The present location of the road does as little injury to private property and public use of the streets as could be done by its location in any other place or manner.

And these defendants are now and always have been ready and willing to do anything that might be reasonably and lawfully required of them to improve the crossing of said streets, although they believe and aver that the crossings are now safe and convenient, and do not obstruct the free use of said streets and lanes.

As to the alleged obstruction of the public road at Harborcreek township, respondents do answer and say: In the location and con-

struction of their road it was important in view of its safety and utility to make the line as straight as circumstances would admit. About six miles northeast of Erie the railroad approaches the line of the Buffalo Road, on the north side thereof near Six Mile Creek. About one-third of a mile east from the creek near the house of Gideon Wagner, the Buffalo Road is crossed diagonally at grade by a safe and convenient crossing safely and securely gravelled and planked. The rails are laid within the boundaries of the road leaving on each side a wide, convenient, and level road, sufficient for the travel of the said Buffalo Road.

Proceeding thence east from Wagner's to Gilbert Elliot's, a distance of about half a mile, the railroad runs south of the Buffalo Road, occupying no part of it.

From Gilbert Elliot's to Elliot's Run the Buffalo Road formerly curved, making a bend or an arc of a circle of about 1300 feet in length, which would require the railroad to cross it twice within that short distance, making two crossings, which, from the shortness of the view and curves of the road, would be unsafe to travellers both upon the Buffalo Road and upon the railroad.

To avoid this evil, the company bought a piece of land north of the road and adjacent to it, and dedicated it to public use for the Buffalo Road, thus affording a wide, strait, and comparatively level road, much better than it before had been, from near Gilbert Elliot's house to Elliot's Run and a short distance beyond. Having made and constructed a road thereon, for the public, in a good and substantial manner, they laid the rails of their track within the bounds of the Buffalo Road at one place for the distance of about 500 feet, crossing diagonally; and at another place for the distance of about 300 feet, crossing diagonally at the points where the railroad crossed and recrossed the Buffalo Road, as above stated. The strip of land dedicated to the public for straightening and improving the Buffalo Road so as to avoid crossing and recrossing, is over a quarter of a mile in length and the usual width.

By this means they have been enabled to construct their railroad in a straight line for about seventeen miles with but one crossing of the Buffalo Road, as now travelled, and that in a safe and convenient manner at grade.

It was found that this straight line would have crossed and recrossed the Buffalo Road three times, as aforesaid (owing to the curvature of that road), within a distance of about a mile between a point about six miles and a point about seven miles from the city of Erie, at Harborcreek township. These three crossings could be reduced to one, either by straightening the Buffalo Road between the house of Gilbert Elliott and that of S. Stillman, something over one-third of a mile apart, as has been done, or by making three or four curves in the railroad. As the latter alternative would have rendered the railroad much less safe and useful, the view along the same being thereby obstructed, and the motion of the trains retarded; and

as the Buffalo Road could be made more level, straight, and in every way more convenient to the public, the land necessary for that purpose was purchased by the Company and dedicated to the public use as above stated, and the road constructed thereon has ever since been used by the public as more safe and convenient.

By thus straightening the Buffalo Road, the danger of crossing was diminished, both to travellers on the railroad and the Buffalo Road, a clear view being afforded for greater distance of trains and travel approaching either on the Buffalo Road or railroad.

The railroad moreover could not have been constructed from Erie to the State line without crossing the Buffalo Road at some point, unless by a vast increase of expense in construction, and an increase from the present grades of from 15 feet to 40 or 50 feet to the mile, and the country through which the road passes could not have been so well accommodated.

At the place of crossing the road has been gravelled and planked in the manner required by the order of the road commissioners, and the company is now and always has been ready and willing to do whatever can be reasonably and lawfully required of them to make the crossing at Harbor Creek safe and convenient to the public using the Buffalo Road.

And they further say, that no other route north of that adopted could have been selected between the borough of Erie and the east line of Northeast Township, on which the railroad could have been constructed, without a great additional expense, and heavier grades and more disadvantageous lines. Nor could it have been constructed without crossing important public roads with greater disadvantage than at present, and also deep gulleys.

The road is located near the ridge, in the most advantageous line for engineering, in view of crossing the streams, obtaining a level route, and avoiding high embankments and deep cuts. It passes through a fertile, improved, and productive country, affording trade and business that could not have been to an equal degree obtained by any more northern route.

The charter of the company imposed no obligation to go to the harbor of Erie, and the lake being 110 feet below the level of the road, to reach it would have required grades nearly double what they now are, thereby not only greatly enhancing the original cost, but also limiting the capacity of the road for business and traffic, and impairing its value and productiveness, because the weight of trains must be regulated by the maximum grade of the road, and is graduated thereby.

Between Erie and the State line are three large creeks running into the lake; one called twelve mile creek, one sixteen mile creek, and the other twenty mile creek. From the nature of the country, the best and only suitable points were selected for crossing these streams where they are now bridged about two miles distant from the lake. To reach Presque Isle Harbor from the point of crossing these

struction of their road it was important in view of its safety and utility to make the line as straight as circumstances would admit. About six miles northeast of Erie the railroad approaches the line of the Buffalo Road, on the north side thereof near Six Mile Creek. About one-third of a mile east from the creek near the house of Gideon Wagner, the Buffalo Road is crossed diagonally at grade by a safe and convenient crossing safely and securely gravelled and planked. The rails are laid within the boundaries of the road leaving on each side a wide, convenient, and level road, sufficient for the travel of the said Buffalo Road.

Proceeding thence east from Wagner's to Gilbert Elliot's, a distance of about half a mile, the railroad runs south of the Buffalo Road, occupying no part of it.

From Gilbert Elliot's to Elliot's Run the Buffalo Road formerly curved, making a bend or an arc of a circle of about 1300 feet in length, which would require the railroad to cross it twice within that short distance, making two crossings, which, from the shortness of the view and curves of the road, would be unsafe to travellers both upon the Buffalo Road and upon the railroad.

To avoid this evil, the company bought a piece of land north of the road and adjacent to it, and dedicated it to public use for the Buffalo Road, thus affording a wide, strait, and comparatively level road, much better than it before had been, from near Gilbert Elliot's house to Elliot's Run and a short distance beyond. Having made and constructed a road thereon, for the public, in a good and substantial manner, they laid the rails of their track within the bounds of the Buffalo Road at one place for the distance of about 500 feet, crossing diagonally; and at another place for the distance of about 300 feet, crossing diagonally at the points where the railroad crossed and recrossed the Buffalo Road, as above stated. The strip of land dedicated to the public for straightening and improving the Buffalo Road so as to avoid crossing and recrossing, is over a quarter of a mile in length and the usual width.

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creeks would require both the Buffalo Road and the Lake Shore Road to be crossed, these roads being nearly parallel to the lake, and between it and the points where said creeks require to be crossed. A draft representing the relative position of the lake, creeks, roads, and railroad, is herewith filed as an exhibit marked *D*, and made part of this answer.

The road was completed from the east line of Northeast township to the depot between Peach and Sassafras Streets, so as to be brought into use on the eighth day of January, 1852, as aforesaid. At the depot it is not more than 5,500 feet, or thereabouts, distant from the lake. It was located on the line, which, from careful survey and exploration, was believed to be most advantageous to the public, and to the trade and business of the road, and was constructed in the manner least injurious to public and private interests.

Respondents deny that any better location could have been made, or that it could have been constructed in any manner less injurious to the rights and interests of the commonwealth.

As to the charge in said bill, that the defendants accepted the provisions of the act of the 11th of March, 1851, by acting under the 14th section of the act of April 14th, 1852, and exercising the privileges conferred by the said mentioned section, and that in violation thereof, the said company did proceed in December last to take up their track and lay it down over and upon their road of the width of four feet ten inches, these respondents further answering do say:

That their said road extends from the Borough of Erie to the east line of the township of Northeast, which is the boundary line between Pennsylvania and New York, the distance of about nineteen miles. That at the eastern terminus it is met by a railroad of the Buffalo and State Line Company, extending, at a gauge of four feet ten inches, to the City of Buffalo. At Erie it is met by a road, at a gauge of four feet ten inches, constructed by the Franklin Canal Company, and forming a connection with the railroads extending west and southwest through the States of Ohio and Indiana. That the way trade and traffic between Erie and the State line would not have justified the construction of their road, and its accommodation alone was not in view by the General Assembly when they granted, nor by the company when they accepted the franchises conferred by the charter, and made their expenditure in the construction of their work.

But the defendants were incorporated, and they expended their money for the construction of a road which was to form a part of the great thoroughfare of trade and travel along the lake shore, and between the Atlantic and the western and southwestern States.

From a peculiar policy which heretofore prevailed to some extent in this State, the act of the 11th of March, 1851, and the 14th section of the act of April 14th, 1852, was passed, fixing the gauge of railroads in the County of Erie, and requiring any road on the defendants' line to be either of the gauge of six feet, or of the gauge of four feet eight and one-half inches.

In obedience and conformity with said last-mentioned act, your complainants in constructing their road laid down a track of the gauge of six feet. This required in a distance of nineteen miles two transshipments or changes of freight and passengers going west to be made, one at the State line, and one at Erie, and that freight and passengers bound east should be changed twice, viz: at the same points, thereby imposing labor, risk, expense, and delay upon the company, and also serious loss of time, damage, and injury to the trade and travel of the road, without any appreciable, public, or private advantage.

In view of these evils, and sensible that no advantage could be derived from this useless restriction and vexatious burthen imposed on trade, the General Assembly of this Commonwealth, by act approved the 11th day of April, 1853, enacted, That every Railroad Company heretofore chartered, or which hereafter might be chartered, is hereby authorized to construct or change their gauge or gauges of road to such width as the Directors of such Railroad Company may deem expedient, and all laws inconsistent with this provision be and the same are hereby repealed.

By this act the restriction heretofore imposed upon the defendants by the act of 1851, and the act of 1852, were repealed, and also all laws inconsistent with the free unrestricted principle of railroad trade, established at the policy of Pennsylvania by the said act of April, 1853.

From and after the passage of said last-mentioned act these respondents were authorized and empowered to change the gauge of their road to such width as the Directors might deem expedient, any law to the contrary notwithstanding.

The Buffalo and State Line Railroad being about 70 miles in length, that company deemed it unreasonable for them to change for that distance in order to conform to a road of only 19 miles in length, and by reason of the gauge of Ohio roads uniformity could not even then be secured, unless by changing all the roads in that State, which, by an accidental circumstance fixing the gauge of the first road built in Ohio, had been established at four feet ten inches. But by changing defendants' road from six feet to four feet ten inches uniformity could be secured along the whole line of Lake Erie, and the line extending also from Buffalo to Cincinnati.

The Directors of the Erie and Northeast Road did therefore deem it expedient to change the width of their road from six feet to four feet ten inches; and accordingly by authority of the act of Assembly of 11th of April, 1853, that change has been made.

And for their power and authority so to do, notwithstanding the said acts of 1851 and 1852, and all laws inconsistent with such power, these defendants here plead the said act of the General Assembly of this Commonwealth, passed the 11th April, 1853.

As to the charge of said bill that the said defendants did contract and agree to, and with various persons from whom said Railroad

Company purchased the right of way, that the road should be and remain a track of the width of six feet between the rails, and that said agreement constituted a part of the consideration for which said land and right of way was sold; respondents further answering say: That the said charge and allegation is untrue. They deny that such agreements and contracts were made, and they deny that any such agreements formed part of the consideration for which the land or right of way was sold.

As to the charge in relation to the contract with the Buffalo and State Line Railroad Company in said bill referred to, these respondents further answering deny that the same or any part thereof is in violation of law and contrary to equity and conscience, and to the great injury of the interests of the Commonwealth. On the contrary they aver that the same is a fair and equitable agreement in accordance with the law, and consistent with the interests of the Commonwealth and of the public.

The change of gauge aforesaid being justified and adopted for the reasons above stated, to accommodate the trade and travel on the road, required a very large expenditure of money for the purchase and maintenance of running stock and in the erection of engine, and repair shops, engine, and car-houses, station buildings, tools, machinery, and materials necessary for the use of the road.

The short distance of road on which such outlay was required and from which its earnings were to be made would not justify such expenditure.

But by effecting an equitable arrangement with the connecting company, the expense and burden would be shared, and thereby greatly diminished. Besides, it was for the advantage, not only of the company, but also contributed greatly to the safety and convenience of the public, that the thoroughfare from Erie to Buffalo should be under some general supervision as to its working, rather than of different subordinates. In view of these objects, an agreement was made between the defendants and the Buffalo and State Line Company, a copy of which is hereto annexed, and made a part of this answer, as an exhibit marked "E," the terms and provisions of which are just and reasonable, within the powers of the company, and tend to the public utility of the road.

Further answering, these defendants say, that although by the seventh section of their charter they were authorized to construct their road on any public street, lane, or bridge, providing the same did not impede or obstruct the free use thereof, and provided they erected and maintained good and convenient crossings, yet when their road was being located and constructed, in order to secure peace and harmony with the citizens and authorities of the city of Erie, and construct their road in a manner that should be agreeable to them, they made the application to the Select and Common Councils of said city, as set forth in exhibit "H," hereinafter mentioned.

Whereupon the resolutions were passed herewith, filed, and marked

"H," and made part of this answer, and the conditions thereof were complied with by the company.

That afterwards they did construct their road so as not to obstruct the free use of any public road, street, lane, or bridge, laid out, opened, or built in said city; and erected and maintained good and convenient crossings by suitable bridges and causeways upon and over the streets crossed by said road in manner hereinbefore stated. They deny that the said railroad so located across the streets of said city, was or is a nuisance or injury to the city, and to the citizens thereof.

They deny that the said city, by her proper officers, gave notice of the same to said railroad company, and required them to remove their railroad from the city, and from the streets, lanes, and alleys thereof, as alleged in the bill. But the Mayor and High Constable of said city, and others pretending to act under color of some pretended authority of the Councils, on or about the fifth of December, 1853, and on divers other days and times since, wrongfully and unjustly, with force and violence, did break down, burn, and destroy the bridges of said company, and without any reasonable or just cause did tear up, remove, break and destroy the rails, causeways, and track of said road, where the same crossed the streets aforesaid, thereby doing great and irreparable damage to the defendants, and imposing great loss, danger, and inconvenience to the trade and travel of said road.

And your respondents aver that said bridges, causeways, crossings, and track, were made, erected and constructed over and across said streets with the knowledge and assent of the city of Erie and her corporate authorities and citizens, and were continued for a long time without any objection or complaint. And that even if the said city had a right to require the removal thereof, reasonable notice of such requirement should have been given, and reasonable time allowed for that purpose, so that the structures might be changed or removed without loss or damage. But no such notice as alleged in the bill was given, nor time allowed, and the property of the defendants was wantonly and unjustly destroyed.

These defendants further aver that they always have been and ever were ready to make any change in the bridges, crossings, causeways and track of said road that might be reasonably and lawfully required of them for the public safety and convenience, and have expended a large sum of money, to wit, over $13,000 in the purchase of land, so as to erect and construct their road thereon.

And they further aver that whether the privileges granted by the Select and Common Councils of Erie to the said Erie and Northeast Railroad Company, allowing them to use and occupy the streets of the city of Erie, as aforesaid, were null and void or not, yet the said city was and is in equity precluded from wantonly revoking said grant, and from authorizing and requiring the removal of said bridges, crossings, causeways and track, and from doing or sanctioning any

act or thing to molest, injure, or disturb the Company in the enjoyment thereof, much more from doing or sanctioning such acts without due notice and reasonable time allowed.

And for the residue of their answer they refer to their answers to the interrogatories to them specially propounded.

To the first interrogatory they answer:—

That they have, as they are advised, fully answered each and every of the charges in said bill contained, and admitted or denied all matters therein stated.

To the second interrogatory they answer:—

That they claim authority to cross the public road in the township of Harborcreek, in Erie County, Pennsylvania, as hereinbefore stated, under and by virtue of the provisions of their charter, and of the laws of that Commonwealth, and aver that they have fully and in all respects complied therewith, and do not impede or obstruct the free use of any road in the township of Harborcreek.

To the third interrogatory they answer:—

That they claim to use and cross the streets in the city of Erie, as herein stated, under and by virtue of the provisions of their charter, and the laws of this Commonwealth, and also by the license and assent of the authorities of said city, as hereinbefore stated.

To the fourth interrogatory they answer:—

That they claim the right to build and construct, and did build their railroad into a convenient and proper part of the then borough (now city) of Erie, as hereinbefore stated, under and by virtue of the provisions of their charter, the laws of the Commonwealth, and by the license and permission of the said city, as hereinbefore stated.

To the fifth interrogatory they answer:—

That the said road never was constructed to what was in the year 1842, the borough of Erie; that they did construct the same to what was the borough of Erie when their road was commenced and finished, and to have carried it into and further towards the centre of said borough, now city, would have involved the necessity of crossing more and other streets therein.

To the sixth interrogatory they answer to the first clause thereof:

That it was not the better place to have erected and constructed the said road to the Lake and Harbor of Erie, but on the contrary, the route and course selected, and each part thereof was, and is the true and proper route for the construction thereof; and to the second clause of said interrogatory, whether it was not especially agreed by the Company to erect and construct the same to the Dock, Harbor and Lake, they aver that there is no charge or allegation in the bill, in reference thereto, and therefore it cannot be the subject of discovery or relief, and to the same they do therefore demur.

To the seventh interrogatory they answer:—

That they did accept the said two acts of Assembly in this interrogatory mentioned, but the same were afterwards repealed as herein before stated, so far as the same are inconsistent with the act of 1853.

To the eighth interrogatory, they answer:—

That they have entered into a contract with the Buffalo and State Line Railroad Company—a copy of which they have annexed to this answer, whereby its contents will appear, and no other. They deny the same to be as in this interrogatory is alleged.

And these defendants deny all, and all manner of unlawful combination and confederacy wherewith they are, by the said bill, charged; without this, that there is any other matter, cause or thing in the complainants' said bill of complaint contained, material or necessary for these defendants to make answer unto, and not herein or hereby well and sufficiently answered, confessed, avoided, traversed, or denied, is true, to the knowledge and belief of these defendants. All which matters and things these defendants are ready and willing to aver, maintain and prove, as this honorable Court shall direct, and hereby pray to be hence dismissed, with their reasonable costs and charges in this behalf, most wrongfully sustained.

And the said Company have caused to be affixed to their answer their common seal and the signature of their President.

[SEAL.]

JNO. A. TRACY,
Pres't E. and N. E. R. R. Co.

JNO. H. WALKER,
Director.

John A. Tracy, President of the Erie and Northeast Railroad Company, and John H. Walker, one of the Directors thereof, being duly sworn, depose and say, that so far as the statements in the foregoing answer contained, are within their own knowledge, they are true, and so far as the same are derived from the information of others, they verily believe the same to be true.

Sworn to and subscribed before me, this thirteenth day of March, A. D. 1854.

J. F. BELSTERLING,
Pro. Prothonotary.

E. M. STANTON,
ST. GEO. T. CAMPBELL,
WM. L. HIRST,
W. M. MEREDITH,
for Defendants.

Exhibits attached to respondents' answer:

Exhibit "A."

Letters Patent.

Pennsylvania, ss.

[SEAL.]

In the name and by the authority of the Commonwealth of Pennsylvania, Francis R. Shunk, Governor of the said Commonwealth, to all to whom these presents shall come sends greeting:

Whereas, in and by an Act of the General Assembly of the Commonwealth aforesaid, entitled An Act to incorporate the Erie and Northeast Railroad Company, and for other purposes, approved the 12th day of April, 1842, and of the Supplement thereto, passed on the 11th day of March, 1846, entitled "An Act to reduce the Capital Stock of the Erie and Northeast Railroad Company," the Governor of the Commonwealth is authorized and required to issue his Letters Patent under the great seal of the State in manner and at the time therein specified. And whereas, the conditions, stipulations and things in the said Act directed to be performed, have been heretofore fully complied with and performed.

Now know ye that in pursuance of the power and authority to me given in and by the said several acts of the General Assembly, I, the said Francis R. Shunk, Governor of the said Commonwealth, do create and erect the subscribers for the number of shares by them subscribed, to wit: C. McSparren, two shares; A. W. Brewster, two shares; William Truesdail, two shares; Smith Jackson, one hundred and twenty shares; M. Courtright, one hundred and twenty shares; James Williams, one hundred and twenty shares; A. W. Brewster, one hundred and eighteen shares; John S. Brown, one hundred and thirty shares; William Truesdail, one hundred and eighteen shares; H. Cadwell, one hundred and twenty shares; G. Sanford, two shares; William Kelly, one hundred and twenty shares; and Charles M. Reed, one hundred and twenty shares, amounting in the whole to one thousand and eighty-four shares; and also all those who shall afterwards subscribe to the stock of the Company, into a body politic and corporate in deed and in law, by the name, style, and title of the Erie and Northeast Railroad Company, and by the said name, the subscribers shall have perpetual succession and all the privileges and franchises and immunities incident to a corporation, and the said subscribers, their successors and assigns are generally to be invested with all the rights, powers and privileges, with full force and effect, and to be subject to all the duties, requisitions and restrictions specified and enjoined in and by the acts of the General Assembly aforesaid.

Given under my hand and the great seal of the State, at Harrisburg, this sixteenth day of December, in the year of our Lord one

thousand eight hundred and forty-six, and of the Commonwealth the seventy-first. By the Governor.

J. MILLER,
Secretary of the Commonwealth.

Exhibit "B."

Section First, Act 29th March, 1805.

"An act to erect the town of Erie, in the County of Erie, into a borough, and for other purposes."

That the first section of the town of Erie, in the County of Erie, shall be and the same is hereby erected into a borough, which should be called the Borough of Erie, and the east side of Parade Street, the south side of Twelfth Street, the west side of Chesnut Street, and Lake Erie, shall be the boundaries thereof.

Exhibit "B. B."

Section 3d, Act April 10, 1848.

Section 3. That the boundaries of the Borough of Erie, in the County of Erie, be and are hereby extended, so as to include, in addition to what is already included within its corporate limits, the territory and inhabitants included and embraced within the following boundaries: Beginning on the east, at the north end of Ash Lane, thence southwardly along the centre of Ash Lane to the southeast corner of out-lot number two hundred and seventy-three; thence westwardly along the southern line and boundary of out-lots number two hundred and seventy-three, two hundred and seventy-six, two hundred and seventy-seven, two hundred and eighty, two hundred and eighty-one, two hundred and eighty-three, two hundred and eighty-four, two hundred and eighty-five, two hundred and eighty-eight, two hundred and eighty-nine, two hundred and ninety-two, two-hundred and ninety-three, two hundred and ninety-six, and two hundred and ninety-seven, and including said out-lots to Liberty Lane; thence northwardly along the centre of Liberty Lane and Liberty Street to the bay and harbor of Erie; thence westwardly along the shore of the bay and around the head thereof, so far as the shore extends; thence by a direct line across the western opening or channel to the western extremity or end of the island of Presque Isle; thence around the outside and northern shore of the island to the eastern end or extremity thereof; thence by a direct line across the eastern channel or the shore of the lake, at and near the northeast corner of the sixty acre reservation, called the Garrison ground, thence along the eastern and southern boundary of said reservation to the northern end of Ash Lane, to the place of beginning, together with all the streets, lanes, public squares and public grounds, including within the limits and territory thus added and annexed: and the jurisdiction of the corporate authorities and other

affairs of said borough, is hereby extended to the limits aforesaid; and all persons residing on the territory thus added and annexed, shall be taken and considered as inhabitants of the Borough of Erie, entitled to all the privileges of the citizens of said borough, and subject to all the laws and ordinances of said borough, and so much of the territory and population thus added and annexed, as lies east of State Lane and State Street, and a line corresponding with its extension north to the northern limits of the borough, shall be attached and belong to the East Ward; and so much of the territory and population thus added and annexed, as lies west of State Lane and State Street, and a line corresponding to its extension to the north line of the borough, shall be attached and belong to the West Ward.

Exhibit C.

Map of Erie, showing boundaries of the borough under the acts of Assemby referred to.

Exhibit D.

Plan showing relative position of roads, lake, &c.

Exhibit "E."

This agreement, made the seventeenth day of November, in the year of our Lord one thousand eight hundred and fifty-three, between the Buffalo and State Line Railroad Company of the first part, and the Erie and Northeast Railroad Compaay of the second part.

The said parties of the first and second part hereby agree each with the other to work and run their roads together as one road, from Buffalo to Erie, upon the following terms and conditions, to wit:—

First. The gauge of the Erie and Northeast Railroad shall be immediately changed to a gauge of four feet ten inches, so that it will conform to the gauge of the Buffalo and State Line Railroad; the cost of making such change and all expenses consequent thereon to be paid and borne by the two companies in the ratio of the present cost of each road.

Second. The roads shall be run under the direction of one superintendent, who shall be appointed by the joint action of the Boards of Directors of the two roads, but he may be removed whenever two-thirds of the directors of either company shall require it. Cyrus C. Dennis is hereby appointed such Superintendent, to hold his office until his successor shall be appointed under the provisions of this agreement.

Third. There shall be a common Treasurer who shall be appointed and who shall be removed in the same manner as the Superintendent. He shall receive the gross earnings of the two roads and keep a correct account thereof, and from and out of such gross earnings of

the two roads he shall pay the running expenses of the two roads, including the salaries and wages of all persons in their employ, and also all damages done to persons and property.

All proper repairs of the roads and of the running stock and machinery connected therewith or belonging thereto. The cost of such new machinery and running stock as shall be found necessary or proper for the use of the roads.

The interest which shall accrue upon the debts of the two companies. Equal dividends not exceeding ten per cent. per annum to the stockholders of each company.

The cost of all such repair shops, engine and car houses, station buildings, tools, machinery and materials as may be found necessary and proper for the use of the roads.

The rest and residue of such earnings (if any there shall be) shall belong to the two companies in the ratio of the cost of each road.

Fourth. The running stock of either party adapted to the use of the roads shall be appraised at cash value at the time of taking effect of this agreement, and at the expiration thereof the company furnishing such stock shall receive the same amount of running stock at its appraised cash value. The remainder of the running stock shall be divided between the companies in the ratio of the cost of each.

The running stock of the party of the second part shall be sold under the direction of the Superintendent of the two roads, and the proceeds thereof deducted from the cost of that road.

Fifth. At the expiration of, or in case of a dissolution of this agreement, each of the parties hereto are to take at the appraised cash value thereof, the repair shops, engine and station houses, appurtenances to its road, and which shall be erected under the provisions of this agreement. And the party so taking such repair shops, engine and station houses, shall pay to the Treasurer appointed under this agreement, the appraised value thereof and the proceeds shall be applied in the same manner as other money which shall be received by the Treasurer under the provisions of this agreement.

Sixth. The roads shall be run by the Superintendent, who shall be appointed under the provisions of this agreement, under the direction of an executive committee of two, one to be appointed by each of the parties; which committee shall also prescribe the mode of keeping the accounts, the safe keeping and disbursement of the money, and all other matters involving the interest of both parties growing out of this agreement.

Seventh. An engine house, and such repair shops and station buildings as the executive committee shall deem necessary for the convenient use of the two roads, shall be erected at Erie, with all convenient expedition.

Eighth. In case satisfactory legislation shall be obtained from the Pennsylvania Legislature, authorizing the Franklin Canal Company, or its assigns, to extend its road southwardly from Springfield or

affairs of said borough, is hereby extended to the limits aforesaid; and all persons residing on the territory thus added and annexed, shall be taken and considered as inhabitants of the Borough of Erie, entitled to all the privileges of the citizens of said borough, and subject to all the laws and ordinances of said borough, and so much of the territory and population thus added and annexed, as lies east of State Lane and State Street, and a line corresponding with its extension north to the northern limits of the borough, shall be attached and belong to the East Ward; and so much of the territory and population thus added and annexed, as lies west of State Lane and State Street, and a line corresponding to its extension to the north line of the borough, shall be attached and belong to the West Ward.

Exhibit C.

Map of Erie, showing boundaries of the borough under the acts of Assemby referred to.

Exhibit D.

Plan showing relative position of roads, lake, &c.

Exhibit "E."

This agreement, made the seventeenth day of November, in the year of our Lord one thousand eight hundred and fifty-three, between the Buffalo and State Line Railroad Company of the first part, and the Erie and Northeast Railroad Compaay of the second part.

The said parties of the first and second part hereby agree each with the other to work and run their roads together as one road, from Buffalo to Erie, upon the following terms and conditions, to wit:—

First. The gauge of the Erie and Northeast Railroad shall be immediately changed to a gauge of four feet ten inches, so that it will conform to the gauge of the Buffalo and State Line Railroad; the cost of making such change and all expenses consequent thereon to be paid and borne by the two companies in the ratio of the present cost of each road.

Second. The roads shall be run under the direction of one superintendent, who shall be appointed by the joint action of the Boards of Directors of the two roads, but he may be removed whenever two-thirds of the directors of either company shall require it. Cyrus C. Dennis is hereby appointed such Superintendent, to hold his office until his successor shall be appointed under the provisions of this agreement.

Third. There shall be a common Treasurer who shall be appointed and who shall be removed in the same manner as the Superintendent. He shall receive the gross earnings of the two roads and keep a correct account thereof, and from and out of such gross earnings of

the two roads he shall pay the running expenses of the two roads, including the salaries and wages of all persons in their employ, and also all damages done to persons and property.

All proper repairs of the roads and of the running stock and machinery connected therewith or belonging thereto. The cost of such new machinery and running stock as shall be found necessary or proper for the use of the roads.

The interest which shall accrue upon the debts of the two companies. Equal dividends not exceeding ten per cent. per annum to the stockholders of each company.

The cost of all such repair shops, engine and car houses, station buildings, tools, machinery and materials as may be found necessary and proper for the use of the roads.

The rest and residue of such earnings (if any there shall be) shall belong to the two companies in the ratio of the cost of each road.

Fourth. The running stock of either party adapted to the use of the roads shall be appraised at cash value at the time of taking effect of this agreement, and at the expiration thereof the company furnishing such stock shall receive the same amount of running stock at its appraised cash value. The remainder of the running stock shall be divided between the companies in the ratio of the cost of each.

The running stock of the party of the second part shall be sold under the direction of the Superintendent of the two roads, and the proceeds thereof deducted from the cost of that road.

Fifth. At the expiration of, or in case of a dissolution of this agreement, each of the parties hereto are to take at the appraised cash value thereof, the repair shops, engine and station houses, appurtenances to its road, and which shall be erected under the provisions of this agreement. And the party so taking such repair shops, engine and station houses, shall pay to the Treasurer appointed under this agreement, the appraised value thereof and the proceeds shall be applied in the same manner as other money which shall be received by the Treasurer under the provisions of this agreement.

Sixth. The roads shall be run by the Superintendent, who shall be appointed under the provisions of this agreement, under the direction of an executive committee of two, one to be appointed by each of the parties; which committee shall also prescribe the mode of keeping the accounts, the safe keeping and disbursement of the money, and all other matters involving the interest of both parties growing out of this agreement.

Seventh. An engine house, and such repair shops and station buildings as the executive committee shall deem necessary for the convenient use of the two roads, shall be erected at Erie, with all convenient expedition.

Eighth. In case satisfactory legislation shall be obtained from the Pennsylvania Legislature, authorizing the Franklin Canal Company, or its assigns, to extend its road southwardly from Springfield or

Girard to the Coal Fields in Mercer County, the parties of the first part hereto, or the stockholders thereof, shall subscribe or procure available subscriptions to such southern extension to the amount of one hundred thousand dollars; or they may, at their option, subscribe such amount to the Pittsburgh and Erie Railroad Company.

Ninth. In case it shall be deemed advisable by both the parties so to do, the two companies may create a debt sufficient to pay for such repair shops, engine and car houses as shall be required, instead of applying the earnings of the road directly to the payment thereof.

Tenth. In case the net earnings are not sufficient, or only sufficient to pay 7 per cent. interest on the cost of the two roads, then the net earnings shall be divided between the two companies in proportion to the costs of the respective roads.

Eleventh. During the existence of this agreement, neither party shall purchase or sell any real estate whatever, without the consent of the other.

Twelfth. Dividends shall be made to the stockholders of each road on the first day of February and August in each year; but the dividend to be made on the first day of February next, shall not exceed five per cent.

This agreement to be binding upon the parties hereto from the date hereof, and in relation to the running of the two roads in common, the same to be in force for two years from the tenth day of February next.

In witness whereof, we have hereunto set our hands and affixed the seals of our respective companies, the day and year first above written.

[SEAL.] GEO. PALMER,
Pres't Buf. and St. Line R. R. Co.

[SEAL.] CHAS. M. REED,
Pres't E. and N. E. R. R. Co.

Exhibit F.

Whereas, The President and Directors of the Erie and Northeast Railroad Company have applied for leave to lay down a track of said road on the north side of Penn Street, and two or three tracks on Ritner Street, for the purpose of giving them access to their woodhouse on Penn Street by trains, and for the purpose of enabling them to break up long trains coming into the city, and back their cars on to the north part of their depot lot; therefore,

Resolved, by the Select and Common Council of the city of Erie, That as far as the Mayor, Select, and Common Council have legal power and authority in the premises, the privilege asked for as aforesaid be, and the same is hereby granted, upon condition, however, that the track be so laid and used as to present the least possible obstruction to the ordinary travel and business of said streets, and placed as directed by the council, and good planking to be substan-

tially built and kept in repair both inside and outside of said tracks, by the said railroad company.

Resolved further, That the said privilege is granted upon the express condition that said city shall not be liable in any form or manner for the damage which any individual may in any way sustain by reason of the laying down or use of said railroad track, but all such damage (if any), shall be paid by the company.

Resolved further, That the Select and Common Councils reserve the right to withdraw the privilege hereby granted, provided the use and occupancy thereof shall appear to them to be injurious to the interests and welfare of said city.

Act of Incorporation and Charter of the Erie and Northeast Railroad Company.

Attached to respondent's answer.

Officers for 1851.—Gen. C. M. Reed, President; Milton Courtright, William Kelley, Smith Jackson, John A. Tracy, John Scoulter, Wilson King, Directors; J. C. Spencer, Secretary and Treasurer.

An act to incorporate the Erie and Northeast Railroad Company, and for other purposes.

Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That Thomas H. Sill, Rufus S. Reed, Samuel Hays, George Kellogg, Samuel Brown, George A. Elliott, John H. Walker, Elijah Babbitt, William Kelley, John A. Tracy, John Galbraith, P. S. V. Hamot, Giles Sandford, Andrew Scott, Joseph H. Williams, William Feming, Joseph M. Sterrett, Smith Jackson, James Williams, William M. Wallace, Abijah Beebe, Alexander W. Brewster, Wilson King, J. W. Hunter, Alexander McClelland, Asa F. Shadduck, J. C. Vanauken, Samuel Low, John Dodge, Andrew Couse, Bester Town, Mark Baldwin, Philetus Glass, Robert McNeil, and William W. Loomis, or any three of them, be and they are hereby appointed commissioners, to do and perform the following duties, that is to say: they shall, on or before the first day of December, Anno Domini one thousand eight hundred and forty-three, open a book or books, at such place or places as they or a majority of the said three shall agree upon, appointing one or more of their number to attend thereat, and receive the subscriptions so made to the stock of the said company, and in the said book or books shall be written as follows: "We whose names are hereto subscribed do severally promise to pay the treasurer of the Erie and Northeast Railroad Company, the sum of fifty dollars for each share of stock which we subscribe for, in such portion, time, and place, as the President and Directors of said company shall direct, and witness our hands and seals this

day of , one thousand eight hundred and . Of the of which book, or books, four weeks' notice shall be given by advertisement in two newspapers in Erie, and in any other papers which the said commissioners may direct. The said books shall be kept open for two weeks at least in each place, for the space of six hours in each juridical day, unless the capital stock of said company shall be subscribed for before the expiration of that time, when the said books shall be closed. The capital stock of said company shall consist of one hundred thousand shares, and all persons shall be permitted to subscribe in said books who are of lawful age, either by themselves or by legally authorized attorneys in fact, and any incorporated company or body politic may be authorized to subscribe as aforesaid: Provided, That no subscription shall be received, unless the persons so subscribing shall pay at the time of subscribing, five dollars on each share so subscribed.

Section 2. When one thousand or more shares of said stock shall be subscribed, the said commissioners, or any five of them, shall certify to the governor, by oath or affirmation, the names of the subscribers, and the number of shares taken by each, whereupon the governor shall, by letters patent under his hand and the seal of the commonwealth, create and erect the subscribers, together with those who may afterwards subscribe, into a body politic and corporate, in deed and in law, by the name, style, and title of the Erie and North Railroad Company; and by that name to have perpetual succession, with all the privileges, franchises, and immunities, incident to a corporation; and be able by the same name to sue, and be sued, plead, and be impleaded, in all courts of record, and elsewhere; and to purchase, receive, have, hold, and enjoy, to them and to their successors, lands, tenements, and hereditaments, goods and chattels, with estates, real, personal, and mixed, of what kind or quality the same may be, which may be necessary for the construction of said railroad, and for no other purpose; and make such dividends of the profits of the road from time to time, as the president and directors or a majority thereof may determine; and also to make and have, keep and use a common seal, and the same at any time to alter, or renew; and also to make and ordain such by-laws and regulations for the government of said corporation as are necessary and useful, and not contrary to the laws of the commonwealth, or of the United States: *Provided*, That the said company shall not be allowed to exercise any banking privileges, or any other liberties and privileges than such as are necessary to the making and maintaining of said road; *And provided also*, That the said road be made of the T or H rail, or such other iron rails as may be approved by the president of the Board of Canal Commissioners for the time being, and duly certified to the governor.

Section 3. The commissioners before named, or a majority of them, as soon after the said letters patent are obtained as convenient, shall give notice by advertisement for three weeks in the papers before

named, of the time and place appointed for organizing said company; at the time and place appointed as aforesaid, tellers shall be elected by those present, when a president and six directors shall be balloted for, together with a treasurer, and a majority of the stockholders present shall elect a president, treasurer, and directors; that said president and directors, or a majority of the same, shall appoint such other officers and agents as shall be needed in conducting the business of said company, and shall fix the compensation of the same; the said president, treasurer, and directors shall hold their offices for one year from the said day of election, when a new election shall be held: *Provided also*, That if any such election shall fail to take place, that the said company shall not thereby be dissolved, and in case any vacancy shall occur in the board from death or resignation, or refusal to serve, the said vacancy shall or may be supplied by the directors, or a majority thereof, until the next annual election.

Section 4. The said president and directors shall meet at such time and place as may by them be agreed upon, and five thereof shall constitute a quorum, of whom, in the absence of the president, they shall pro tempore elect a chairman; they shall keep minutes of all their transactions, fairly entered in a book to be kept for that purpose, and all orders drawn upon the treasurer shall be signed by the president, after a resolve to that effect has passed the board.

Section 5. Certificates of stock in this company shall be assignable, and if any stockholder neglect, after thirty days' notice, to pay up the instalments of his stock, he shall be liable to pay, in addition to said instalment, at the rate of twelve per cent. for one year, on all sums which may remain due for such length of time, and a neglect or refusal to pay during any greater length of time may be considered as a forfeiture of such stock to the company.

Section 6. The president and managers of said company, by themselves or their agents, shall have power to construct a railroad from the Borough of Erie to some point on the eastern boundary line of the township of Northeast, in the county of Erie, and for this purpose the said company shall have power by themselves, or their agents, to enter in and upon, and to occupy, any land on which the said road may be located, or which may be necessary for the use of said company, and thereon to construct said road with its necessary buildings and fixtures, and likewise to construct any bridge, or bridges, across any navigable stream, not obstructing the same, and the said company shall pay, or satisfy, the owner of such land so taken; and if the parties cannot agree upon the compensation for the damages so done, or the land thus required, it shall be lawful for the said parties to choose five men out of any county adjoining that in which the land so required is situated, to assess the damages sustained, or value the lands taken or required by said company; and if they cannot agree upon five persons, as aforesaid, then it shall be lawful for either party to apply to the court of Common Pleas of the county in which the land so required is situated, or in

which damages have been done, who shall award a venire to the sheriff to summon a jury of seven disinterested men from any adjoining county, to come together on a given day, of which both parties shall have notice, in order to ascertain and report to the said court the damages (if any) have accrued to the owners of any lands, houses, or other buildings, injured by said company, or the value of the lands taken up by, or required, for the construction of said railroad, as the case may be; which said jury being first sworn or affirmed, justly and equitably to assess the damages (if any) which may have been sustained or the value of the land so required, shall proceed to estimate such damages, or the quantity and quality of the land to be occupied by the said road, taking into consideration the advantages, as well as the disadvantages of the same; and shall report the amount of damages, or value of the land, as the case may be, to the court, which report shall be confirmed in twenty days after the filing of the same, unless exceptions be entered by either, in which case, if exceptions be filed by the person claiming damages, the said company may be permitted, upon giving such security as the court of common pleas aforesaid may require, for the payment of the damages that may be finally assessed, and tendering to the claimant or paying into the court the amount of damages so assessed, or the value of the lands required, to enter upon said land, and proceed with their work, subject however to the amount which the claimant may be enabled to establish on final judgment against them: *Provided* always, That in case the owner, or owners, of any of the lands through which the said road shall pass, be feme covert, minors, *non compos mentis*, or living out of the State, without trustees, guardians, committees, or accredited agents, residing in the county in which their lands are situated, then it shall be the duty of the said company to make known the fact to the said court, who shall appoint some suitable person, or persons, to act in their behalf, under the control of said court; the said company shall also have power to enter upon any lands under the same regulations, to dig, take, and carry away any earth or stone, which may be necessary for the construction or repairing the said road: *Provided*, That neither the said company, its officers, or agents, or workmen, shall enter on lands for such purpose without the consent of the owner, until the company shall pay to such owner the amount of damages he may sustain by entering on his lands, and the value of the earth or stone which may be required for said company, or give security for the payment of the same within six months from doing the damage, or taking such earth or stones; and in case the parties cannot agree on the amount the same shall be fixed by three disinterested freeholders, to be appointed by one of the nearest justices of the peace, on the application of either party, with notice to the other party.

Section 7. The said railroad shall be so constructed as not to impede or obstruct the free use of any public road, street, lane, or

bridge, now laid out, opened, or built, nor to interfere with any burial ground, dwelling house, or building, without the consent of the owner, and where the said road severs the lands of any person, or persons, the company shall be required to erect and maintain good and convenient crossings, either by bridges, or otherwise, where the same may be necessary.

Section 8. The said company shall have the power to keep and maintain such motive powers as they may deem necessary for the said road, and to regulate the time and manner of travelling, the kind and description of cars to be used for the transportation of passengers, or freight, and the compensation to be received by the said company for the same: *Provided*, That the toll on any species of property shall not exceed eight cents per ton per mile, nor upon each passenger five cents per mile.

Section 9. At each annual meeting of the stockholders the president and directors of the preceding year shall make a statement of the condition of the company: *Provided also*, That whenever the president and a majority of the directors may see proper, a general meeting of the stockholders may be called, or when those representing one-third part of the capital stock shall request it.

Section 10. If the company aforesaid do not complete the said work so as to bring it into use within ten years after the passage of this act, or after completion shall suffer the road to go to decay and become impassable for the space of two years, then this charter shall become null and void.

Section 11. At the end of three years from the granting of this charter, the said company shall furnish annually thereafter an abstract of their financial condition to the Auditor-General, and if the said company misuse or abuse any of the privileges hereby granted, the legislature may resume the rights and privileges hereby granted to the said company.

JAMES ROSS SNOWDEN,
Speaker of the House of Representatives.

JOHN STROHM,
Speaker of the Senate.

Approved the twelfth day of April, eighteen hundred and forty-two.

DAVID R. PORTER.

An Act to reduce the capital stock of the Erie and Northeast Railroad Co.

Section 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same*, That the capital stock of the Erie and Northeast Railroad Company be and the same is hereby reduced to six hundred thousand dollars, or twelve

thousand shares; and the commissioners, or so many of them as by the first section of the act incorporating said company are authorized to open books and receive subscriptions to the stock thereof, be and they are hereby authorized and required, after four weeks' notice in at least two newspapers published in the borough of Erie, to re-open the books and receive subscriptions to the stock of said company at the Reed House, in said borough, or such other place in the same borough as they shall deem most expedient; and the said books shall remain open for at least two weeks, and until at least fifty thousand dollars, or one thousand shares shall be subscribed therein, including what is already subscribed, and the proceedings thereupon shall be as provided in the act incorporating said company.

FINDLEY PATTERSON,
Speaker of the House of Representatives.

DANIEL L. SHERWOOD,
Speaker of the Senate.

Approved the eleventh day of March, one thousand eight hundred and forty-six.

FRS. R. SHUNK.

Charter.

PENNSYLVANIA, *ss.*

[L. S.] In the name, and by the authority of the Commonwealth of Pennsylvania, Francis R. Shunk, Governor of the said Commonwealth: To all to whom these presents shall come, sends greeting:—

Whereas, in and by an act of the General Assembly of the Commonwealth aforesaid, entitled An Act to incorporate the Erie and Northeast Railroad Company, and for other purposes, approved the 12th day of April, 1842, and of the Supplement thereto, passed on the 11th day of March, 1846, entitled "An Act to reduce the capital stock of the Erie and Northeast Railroad Company," the Governor of the Commonwealth is authorized and required to issue his letters patent, under the great seal of the State, in manner and at the time therein specified. And whereas the conditions, stipulations and things in the said act directed to be performed, have been heretofore fully complied with and performed. Now know ye that, in pursuance of the power and authority to me given in and by the said several acts of the General Assembly, I, the said Francis R. Shunk, Governor of the said Commonwealth, do create and erect the subscribers for the number of shares by them subscribed, to wit: C. McSparren, two shares; A. W. Brewster, two shares; Wm. Treusdail, two shares; Smith Jackson, one hundred and twenty shares; M. Courtright, one hundred and twenty shares; James Williams, one hundred and twenty shares; A. W. Brewster, one hundred and eighteen shares; John L. Brown, one hundred and twenty shares;

William Treusdail, one hundred and eighteen shares; H. Cadwell, one hundred and twenty shares; G. Sanford, two shares; William Kelley, one hundred and twenty shares; and Charles M. Reed, one hundred and twenty shares; amounting in the whole to one thousand and eighty-four shares; and also all those who shall afterwards subscribe to the stock of the Company, into a body politic and corporate, in deed and in law, by the name, style and title of the Erie and the Northeast Railroad Company; and by the said name the subscribers shall have perpetual succession, and all the privileges and franchises and immunities incident to a corporation; and the said subscribers, their successors and assigns are generally to be invested with all the rights, powers and privileges, with full force and effect, and to be subject to all the duties, requisitions and restrictions specified and enjoined in and by the acts of the General Assembly aforesaid.

Given under my hand and the great seal of the State at Harrisburg, this sixteenth day of December, in the year of our Lord one thousand eight hundred and forty-six, and of the Commonwealth the seventy-first.

By the Governor.

J. MILLER,
Secretary of the Commonwealth.

Complainants' Testimony. Testimony for the Commonwealth.

IN THE SUPREME COURT OF PENNSYLVANIA,
for the Eastern District.

THE COMMONWEALTH OF PENNSYLVANIA, ex relatione FRANCIS W. HUGHES, Attorney General,

vs.

THE ERIE AND NORTHEAST RAILROAD COMPANY.

December T. 1853. No. 7. In Equity.

And now, March 25th, 1864, on motion of Mr. Griscom and Mr. Dallas, the Court appointed James Sill and George Cutler jointly to be examiners to take depositions and other evidence in the city of Erie and in Erie county, to be read on the hearing of the above case; and it is ordered that at least ten days' previous notice be given the parties at Erie before commencing to take testimony, and that testimony be taken only at one place at the same time.

Certified from the Record.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court at Philadelphia, this twenty-fifth day of March, A. D. one thousand eight hundred and fifty-four.

[SEAL.]

J. NULLET, for
ROBERT TYLER,
Prothonotary.

To the Erie and Northeast Railroad Co.:

Take notice, that in pursuance of the foregoing appointment of examiners, depositions and other evidence will be taken before James Sill, Esquire, in the City of Erie, commencing on Saturday, April 8th, 1854, at 10 o'clock A. M., and thence to continue the taking from day to day by adjournment, until all the evidence shall have been taken in said case.

THOMPSON & GRANT,
of Counsel for Complainants.

Erie, Penna., *March 28th*, 1854.

Erie County, ss:

Benjamin Grant, being duly sworn, says that he served the foregoing appointment of examiners, and notice on the defendants, on the 28th day of March, 1854, by handing a copy of the same to John A. Tracy, Esq., President of the Erie and Northeast Railroad Company.

BENJAMIN GRANT.

Sworn and subscribed before me, this 10th day of April, 1854.

JAMES SILL,
Examiner.

We, George H. Cutler and James Sill, appointed examiners in the above cause, do swear that we will perform our duties with fidelity.

GEORGE H. CUTLER,
JAMES SILL,

Sworn and subscribed before me, April 10, 1854.

S. MERVIN SMITH, *J. P.*

The execution of this commission appears in certain schedules hereto annexed.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Examiners' fees, $300 00.

April 8th, 1854, the examiners met at the time and place indicated in the foregoing notice, and adjourned until Monday, April 10th, at 1 P. M., when Messrs. Thompson and Grant appeared as counsel for complainants, and Messrs. Walker and Wetmore appeared as counsel for respondents, when the examiners having been duly sworn,

Norman Nash, produced by complainants, was sworn and testified as follows: I am 52 years of age, reside in Northeast township, two

miles east of the town of Northeast, on the Buffalo road. I am a farmer, and have resided there since 1814, when my father moved there. I am acquainted with the Buffalo road, and have been ever since I lived there. It is a principal road leading from Erie east. The Erie and Northeast Railroad runs on this Buffalo road. It strikes it east of Mr. Elliott's (I think a little east). I never measured it, but judging from the eye, I should say that it run on it something like eighty rods. It has taken up, occupied the old original Buffalo road, so it cannot be travelled on at that place. There is a road built a little north of the railroad which is travelled. I don't know who built it; it was built about the time that the railroad was built, and travelled upon after the rails were laid down. The railroad crosses the Buffalo road near John Mills' and Gideon Wagner's. It runs diagonally across the road, I should think occupying about 15 rods (as near as I can judge from crossing). It continues, after crossing the road both east and west of the crossing, along the side near the road about a mile. The bridge at Harbor Creek (railroad bridge over a small stream called Harbor Creek) I should think to be on the old original Buffalo road.

Q. From the manner in which the railroad crosses diagonally over the Buffalo Road to Wagner's and Mills', state if you please whether it is an obstruction to the Buffalo Road, and whether it is a serious obstruction or not. State particularly.

A. I consider it a very serious obstruction. The cars running so near the Buffalo Road, and then diagonally across the road, it is impossible but that a team will scare, excepting it belongs right alongside the road. Aside from the cars running, I consider the rails laid on the road, the superstructure an obstruction. I drove (it was in September or October last) with my sister, and I was within 15 or 20 rods of the crossing, and I thought I was out of danger, and just as the horse struck his hoof on the track, I heard the horn of the locomotive. The train was about five rods behind my carriage when I first discovered it; my horse stood about one-half across the track. I screamed to my horse—a very fiery one—and he sprang and just cleared the train. I do not consider the Buffalo Road, with the railroad located along there safe for public travel.

Cross-examined by Counsel for Respondents.

The Buffalo Road from Southmayd Stilman's going east, inclines to the north from the railroad. I meant, in my direct examination, when I said the railroad was along side of the Buffalo Road one mile, to include it both east and west of the crossing.

The stream I call Harbor Creek, in my direct examination, is the little stream a little east of Plary Elliott's. The crossing of the Buffalo Road, near Wagner's and Mills', by the railroad, is at grade or nearly so, I should judge from my observation; I mean the grade of the old Buffalo Road. On the occasion of my being so near injured last fall, the train was coming from the east. I was coming

from the east. I should think that on the crossing the view towards the east is unobstructed for a mile after you get on the crossing.

Question by respondents' counsel.

State whether it is not better to have the new Buffalo Road, and not cross the railroad at Gilbert Elliott's, than to cross it twice there as you would have to do if the road had not been made.

A. I don't understand that well enough to answer the question, I don't see any necessity of crossing it twice there.

Q. Suppose the old Buffalo Road had remained there, would not the railroad have crossed it twice at or near Gilbert Elliott's?

A. As near as I can judge, it is my opinion that it would not be necessary to cross it there.

N. NASH.

Sworn and subscribed before us this 10th April, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Adley Magill, produced by complainants, was sworn, and testifies as follows:—

I am 62 years of age, reside in Harbor Creek Township, Erie County, and am a farmer. I have been acquainted with the Buffalo Road for nearly 26 years, it being, in May next, 26 years since I have lived on the farm occupied by me. It has been ever since my acquaintance with it, a public highway, and worked by the township. The Erie and Northeast Railroad coming west, first strikes the Buffalo road about a rod east of a little stream called Harbor Creek; I should think that it takes up pretty much all the Buffalo Road, that it destroys the use of the same about eighty rods, to near Gilbert Elliott's. I mean by destroying the Buffalo Road, that it comes so near in contact with it that it cannot be used or travelled that distance. I should think it occupied the whole of the Buffalo Road for 80 rods or nearly so. It would entirely impede or obstruct the use of the Buffalo Road for that distance. The railroad again comes in contact with the Buffalo Road in crossing at John Mills'. It crosses there diagonally, occupying thirty or forty rods of the road. It would be my judgment that it ran on the road nearly 30 rods.

Question by counsel for complainants.

Do you consider the rails themselves and the superstructure any obstruction to the Buffalo Road at that place (the crossing at Mills')?

A. I do.

Q. State whether you consider the railroad, as constructed and used at Mills', an obstruction to the free use of the Buffalo Road.

A. I do think it is a serious obstruction to the use of the Buffalo Road there. I never saw any injury done there myself, that is any horses or men hurt, I have seen my wheels fall in there, and we had to get out and lift them out.

Q. Do you consider the ground north of the road there equally good for the construction of a railroad as the ground used?

A. I think it equally good for construction of a railroad or public highway. The travel and use of the Buffalo Road is greater, in my opinion, than that of any other road with which I am acquainted in the county. I live about one and one-half mile from the Buffalo Road south. The people of Northeast and Harbor Creek Townships east of these, all come into Erie by that road (Buffalo Road), except a few who come in on the lake road.

Cross-examined by Respondents.

Q. by respondents. Does not the railroad cross the Buffalo Road at Mills', at or near grade?

A. I think it does, if any difference the rails may be a little higher than the road; a team can get across without any difficulty.

Q. Suppose the old Buffalo road to have been left as it was at Gilbert and Plara Elliott's as it originally was, would not the said road have crossed said Buffalo road twice?

A. I think not. What I mean by saying that a team can cross with a little difficulty, I wish to explain. The rails are laid there four feet ten inches apart, and in coming up with a wagon, as this just the width of a wagon, without great care the wheels will get in. I regard this as a serious obstruction. When the wheels get in, they have got to be pried out; and without any cars running, I regard the rails and superstructure as an obstruction.

ADLEY McGILL.

Sworn and subscribed before us this 10th April, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

E. C. Heath, produced by complainants, was sworn, and testified as follows: I reside in Northeast Township, Erie County, two miles west of the State line; am 35 years of age, and am a farmer. I am acquainted with the Buffalo road up to the town of Erie, and have travelled it frequently. The Erie and Northeast Railroad first strikes the Buffalo road a rod or so east of a stream called Harborcreek; from observation (having never measured it) I should say that the railroad runs on the Buffalo road seventy or eighty rods at that place, occupying the road. I think that it impedes the Buffalo road, and obstructs it generally; I mean the old Buffalo road, as it was before the railroad was built. It uses up the whole road where it runs along. It comes in contact again with the Buffalo road at or near Mr. Mills', passing along the road from 15 to 25 rods, as near as I can judge, having never measured it. I think it impedes the Buffalo road along there. I think it a serous obstruction. At both these places I consider the track, independent of its use, an obstruc-

tion. It (the Buffalo road) is more travelled than any other road I know of in the country.

Cross-examined by Respondents.

Q. State whether the railroad does not cross the Buffalo road at Mills', at or near grade.

A. It does nearly so. At the place spoken of by me, where the old Buffalo road has been obstructed, a new road has been constructed north of the old road..

Re-examined by Complainants.

I do not know of the Buffalo road having been changed by authority.

E. C. HEATH.

Sworn and subscribed before us this 10th April, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

James Whitehill, produced by complainants, was sworn and testified as follows: I am a farmer; reside in Northeast Township, Erie County, and am 57 years of age; I have been acquainted with the Buffalo road 49 years. It was a public road, cut out in 1805, since which time I have known it. It is the most travelled of any road we have for a country road. The point where I should think the railroad first comes in contact with the Buffalo road, is about one or two rods east of the stream spoken of as Harborcreek. I should think from observation (having never particularly examined it), that it ran along about 60 rods. For that space it occupies the old road exclusively. So occupied I consider it as a common highway greatly obstructed. At or near Mr. Mills' it again obstructs, or comes upon the road. There it obstructs by diagonally crossing, occupying from the point it touches the Buffalo road to where it leaves it, from 18 to 20 rods. There I should think it some impediment to the use of the road. *I should think it considerable obstruction, because it renders it dangerous.*

Last July or August I was coming to Erie with a two-horse wagon. I called at the Half-way House to see if the cars had passed. I learnt that they were behind time; I thought I would try and get over. I drove pretty smart for that purpose. Just before reaching the crossing I heard the cars whistle near by—I had no time to turn about to prevent the horses from seeing the cars. I jumped to their head and turned their heads, so that they could not see the cars, and

just as I did so the cars passed. The horses were frightened, but no accident occurred.

JAMES WHITEHILL.

Sworn and subscribed before us, this 10th April, 1854.

JAMES SILL,
GEO. H. CUTLER,
Examiners.

Henry Terry, produced by complainants, was sworn, and testified as follows: I reside in Northeast Township, Erie County, about ¾ mile from the village; am a farmer, 51 years of age. I have been some acquainted with the Buffalo road for 22 or 3 years, but have resided where I now do for five years. A year ago last fall I was returning from attending the Fair at Erie. I supposed that the cars were at Erie. I was beyond the crossing, and busy talking with my wife, who was in the carriage with me. I looked up and saw the cars a few rods ahead, coming from the east. My horses began to turn the first thing I knew. I jumped out and caught the horse by the head, and tried to hold him. He got away, went up against the fence, and broke loose from me, whirled into the road, upset the carriage, threw my wife out, broke the carriage, and ran off. This was near Elliott's, a little east of his house.

HENRY TERRY.

Sworn and subscribed before us, April 10, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Samuel C. Stevens, produced by complainants, was sworn and testified as follows: I reside in Harborcreek Township, Erie County; am a farmer, 52 years of age, and reside about 1¼ miles from the Buffalo road. The railroad first comes on to the Buffalo road about a rod or so east of the bridge over Harborcreek (stream). I have been acquainted with the Buffalo road 21 years. From the east point of intersection it occupies the Buffalo road about sixty rods—it occupies the old road exclusively for that distance. It is about one-half a mile west of this to where it again interferes with the road near Mills'. It crosses the Buffalo road there diagonally, using 20 or 25 rods of the Buffalo road in crossing. I mean the Buffalo road now travelled. I consider the track and superstructure of the railroad, at these crossings, independent of the travel, an obstruction to the free use of the road by the public. When the railroad was constructed, they provided two places for crossing, each about 12 or 15 feet wide; one at each end of this occupied part of the Buffalo road. If these were not reached, a person in passing would be liable to rise and fall with the ties. A person passing in the night, and not ac-

quainted with the road, would be no more likely to get on to those crossings than on any other part of the track. I saw the road a few days ago, and would consider it difficult to cross with a load at any other place on the road than these provided places of crossing. These provided places of crossing (plank) are located the one nearly at the east side of the road as crossed, and the other at the west side. This is near Mills'. It has been in its present situation almost ever since it was reconstructed. The part of the railroad between these crossings the road is planked with one plank on the outside, but not on the inside of the track. There is a space between the rails, but I will not be sure that there is not a plank on the inside of the rails, in this intermediate space.

Q. by respondents. Do you consider the track, superstructure, and use of the railroad an obstruction to the road? If so, do you consider it a great or small obstruction to the free use of the road?

A. I consider it a very great and dangerous obstruction to the use of the Buffalo Road during the whole mile and a quarter. I have been acquainted with roads in this as well as other States, and never knew one so much travelled as the Buffalo Road.

Cross-examined by Respondents.

I think that the railroad crosses the Buffalo Road at Mills' at or near grade, the rails and plank are above the grade. If the railroad crossed in that way it could not cross so as to be a less obstruction than it now is. On the outside of the rails, through the entire space of the road occupied in this place, there is plank laid, and has been since it was re-laid.

On Tuesday last the space between the rails was not entirely covered with plank, there may have been a narrow plank inside of each rail, but the space was not filled up. At the crossings it is planked the length of a plank over the entire space occupied by the railroad for the width of 12 or 14 feet, and between these crossings. I think, on further reflection, that there is a plank laid along the inside of the rail, along the whole space occupied by the railroad. North of the sixty rods occupied, referred to in direct examination, there is a new road constructed. I do not think that the new road or the new bridge so constructed is better than the old road or bridge.

Q. by respondents. State in what you consider the railroad a very great and dangerous obstruction to the Buffalo Road, at the points you have mentioned in your examination in chief.

A. I consider it dangerous to travellers, in frigh horses, and in driving cattle, driving hogs, and anything passing over it. With the present location of the railroad the travel upon the new road is less dangerous than it would be upon the old road if the new one had not been built.

Q. by respondents. Where the rails are laid, did not the old Buffalo Road run entirely south of it?

A. I do not know.

Re-examined by Complainants.

For the first sixty rods of the old Buffalo road, occupied by the railroad, the road cannot be travelled at all in its present state. The new road can be travelled, but I consider it a very dangerous road, *because of its proximity to the railroad.*

If the railroad had crossed at right angles instead of diagonally it would have been less dangerous. I have for 21 years been acquainted with the country north and south of Elliot's, as far up as Erie. It is a beautiful and level country. From Erie to a point as far east as Moorehead's the character of the country is very much the same. I mean the land north of the present railroad.

Cross-examination resumed.

I am not an engineer. I never examined the country from Erie as far east as Moorehead's with a view to the location of a railroad. If the railroad kept far enough north it need not cross the Buffalo road. I think that a railroad could be located and built, from Erie to the N. Y. State Line, north of the Buffalo road. I think it could be done. I cannot say what would be the difference in expense between constructing the road, on this northern route from Erie to the N. Y. State Line, from its present construction, nor can I state the difference in grade.

SAMUEL C. STEVENS.

Sworn and subscribed before us this 10th of April, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Joseph McCord, produced by the complainants, was sworn and testified as follows: I reside in Northeast Township, Erie County, about 3 miles from Northeast Village. Am a farmer, 43 years of age. I am acquainted with the places where the railroad crosses the Buffalo road. Where it first comes on to it, it occupies the road some 40 rods near Gilbert Elliott's. I cannot say whether it crosses the road at Elliott's twice or not. Where it crosses at or near Mills' it obstructs the road. It is a dangerous place for teams to cross. This last place is near Mills', between him and Wagner's. The Buffalo road is very much travelled, the only road that I know of by which the people of Northeast can come to Erie with a load.

Cross-examined by Respondents.

I cannot say whether the railroad crosses the old Buffalo road near Elliott's twice or not, there was a short elbow there. There is a new road north of the Elliott's built since the railroad was located. The new road is straighter and more level than the old road. I cannot say that it is better. I cannot say as to whether the new road is as

good as the old one. It is good now. I think the railroad crosses at Mills' at grade, or nearly so.

Re-examined by Complainants.

The new road from its proximity to the railroad is a dangerous road to travel. The old road is entirely obstructed. I think that the old Buffalo road would be more dangerous than the new road to travel upon, with the exception of one stream, the land is level from the crossing at Mills' to the crossing of Harborcreek stream. The crossing at Mills' is dangerous because it is some distance in crossing, and it is near the railroad for some distance east and west.

JOSEPH McCORD.

Sworn and subscribed to before us, April 10, 1854,

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Adna Steele, produced by complainants, was sworn, and testified as follows: I reside in Harbor Creek Township, Erie Co. Am a farmer, and fifty-one years of age. I have been in the habit of travelling the Buffalo road some, and am acquainted with it where the railroad first comes on to the Buffalo road. It comes on to it and obstructs it for some 70 or 80 rods, near Plara and Gilbert Elliott's. From the way it runs along by Plara Elliott's it obstructs the road very much. It occupies it almost exclusively. I think it obstructs the road in that place very much, obstructing the safe and free use. It comes on to the Buffalo road again at or near Mills'. There it occupies in crossing (within the limits of the Buffalo road) some 25 rods crossing diagonally, and not occupying the travelled path all the way. It keeps near the Buffalo road some distance, a number of rods each way. From necessity crossing diagonally it must be near the road on each side of the crossing, as it is (at Mills'), I consider it quite an obstruction to the Buffalo road. The road, irrespective of the cars, I consider would be an obstruction to the road. My horses have been frightened, but I have had no serious difficulty.

Cross-examined by Respondents.

At Elliott's it would be difficult to state what distance the rails occupy the old Buffalo road.

Q. In what does the obstruction at Mills' in the railroad crossing the Buffalo road consist?

A. It consists in the danger in crossing the railroad. You have to turn nearly at right angles to avoid getting into the rails; this one obstruction and the only one I have to speak of aside from the danger of meeting the cars. The railroad crosses the Buffalo road at Mills', at or near grade. I could not cross there in a manner to obstruct less without it more nearly at right angles. There is a new

road north of the Elliott's, built since the railroad was located. It is straight and a little more level (less rise at Plara Elliott's). It is as good as the old road was at that place.

Re-examination by Complainants.

The Railroad Company have fenced up a part of the old Buffalo road, from where it crosses at the east end to Gilbert Elliott's. The company have exclusive possession of it. I cannot say whether the township keep up the new road or not, they have kept up the old road since I came into the country. So far as I am acquainted with the country, nearly as far as Moorhead's from Erie, the country is level or nearly so. This would be 8 or 9 miles frome Erie east, about one and a half miles from where the railroad crosses.

Cross-examination resumed by Respondents.

I am under the impression that there is no material difference between the ground where the present railroad is placed and where I have spoken of north of the road. I never examined the county from Erie east, with a view to the location of a railroad. I am not very much acquainted with the country east of the Moorhead's. I think is quite an elevation between Moorhead's and the land east of these on this northern route.

ADNA STEELE.

Sworn and subscribed before us, April 10th, 1854.

GEO. H. CUTLER and
JAMES SILL,
Examiners.

William McCord, produced by complainants, was sworn, and testified as follows: I reside in Northeast Township, Erie County; am 56 years of age; a farmer. I have travelled the Buffalo road for some 40 years; have become well acquainted with it, having travelled it every year more or less. The railroad comes on to the Buffalo road a few rods east of Harbor Creek (or Elliott's Run). It occupies the Buffalo road I should judge for some 60 or 80 rods. There is an embankment and bridge. From where it comes on to the road the embankment and bridge are higher than the Buffalo road (I should think 10 or 15 rods were so) say from 6 to 10 feet. It occupies the old road from 60 to 70 rods, and during the balance of the road so occupied, it is some higher than the old road. The railroad obstructs the old road entirely. It is fenced by the company so as to exclude the public from it. It next comes on to the Buffalo road (about a mile from the place that it first comes on) near John Mills'. There it occupies some 20 or 25 rods of the old Buffalo road, it crosses there. I should think it an obstruction to the Buffalo road. It is a serious obstruction to the travel upon the road (considering the cars, superstructure, and railroad) there. I am acquainted with the country between Erie

and Moorhead's. It is a level country generally. Moorhead's is three miles east of Elliott's.

Cross-examined by Respondents.

East of Moorhead's to the north of the road there is a gulph which is greater than where the gulph is crossed by the railroad. The gulf is about from 600 to 800 feet across, and the bank on the east is some ten feet higher than the bank on the west side. There is considerable less gulf where the railroad crosses now. Where now located the cutting to get through that hill is not over six feet. The sixteen mile gulf is greater than the twelve mile gulf. North of the Buffalo road the bridge over the sixteen mile gulf would be about the same length that the present railroad bridge over the same gulf is. North of the Buffalo road the depth of the gulf is from forty to fifty feet. Across the gulf it would be from 10 to 15 rods. North of the bridge and embankment at Elliott's there is a new road which is used in place of the old one. It is straighter than the old Buffalo road and leveller. It goes on lower ground. I presume it accommodates as well as the old road did. I think that there is not much of an embankment; I don't know that there is any west of Plara Elliott's on the old Buffalo road.

Q. Could not the embankment east of this bridge (including all the embankments) have been so widened as that the old Buffalo road could have remained there and crossed where the rails are laid?

A. I could not tell.

The obstruction of the road at Mills' consists in crossing diagonally, and the road runs pretty near to the railroad on each side. It crosses near at grade. I do not see how it could cross with less obstruction than it now does. The railroad bridge at the 16 mile gulf at the present crossing is about 25 feet high.

Re-examined by Complainants.

In saying that the new road near Elliott's accommodates the public, I meant passing over it. The new road is dangerous by its proximity to the railroad. The railroad along there east and opposite to Plara Elliott's is higher than the old road. The crossing of the Buffalo road at Mills' would have been less obstruction if it had been crossed at right angles, or if the road was widened after it was crossed so that we could away from the railroad track. I know the country between the gulf at Moorhead's and where the railroad crosses at 16 mile creek. It is middling level. There is one deep cut and one middling gulf. There would be a long bridge near McNeils, from 15 to 20 rods long. There would be but little difference except that the gulfs would be deeper; the land is generally level.

Cross-examination resumed.

Q. From the point north of the Buffalo road near Moorhead's to the present crossing of the 16 mile creek by the railroad, state what

would be the cutting through the Moorhead hill, and whether it would not cross the Buffalo road diagonally?

A. I cannot say what the cutting would be, but it would be no great, and it would cross the Buffalo road diagonally; the bridge would be 20 rods long and from 15 to 20 feet high. As the railroad now is at present this 16 mile gulf is nearly avoided.

WM. McCORD.

Sworn and subscribed before us, April 10th, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

John McCord produced by complainants, was sworn, and testified as follows: I live in Northeast township, Erie County, 3 miles from the village; am a farmer, 47 years old. I have travelled the Buffalo road for 30 years, every year more or less; I know it pretty well.

The Erie and Northeast Railroad crosses the Buffalo Road near Mr. Elliott's. There was a crook in *in* the old Buffalo Road there; it comes on the Buffalo Road near Plara Elliott's and continues along the road a short distance, then leaves it and returns on to it and occupies 50 or 60 rods of the road, using up that part of the old road which is fenced in. It next comes on to the Buffalo Road at Mr. Mills' and crosses at angles, occupying about 20 rods. I think the railroad there is an obstruction to the Buffalo Road, a very dangerous place.

Cross-examined by Respondents.

Q. In what does the danger consist in crossing at Mr. Mills'?

A. The danger is that a person in crossing if they have a wild horse is in danger of their life. A person with a covered carriage does not see the cars coming behind them. I don't see how the Buffalo Road could be crossed at Mills' with less obstruction than there now is. The railroad crosses at grade. There is a road for travel north of the Elliotts. It is straighter and more level than the old road. The new road (not taking into consideration the proximity of the railroad) accommodates the travel as well as the old road.

Q. Could not an embankment be made where the old Buffalo Road is, so that travel could go alongside of the rails?

A. It could, but would be expensive. It would be better to have the road where it now is than to build the embankment on the old road as spoken of.

Direct Examination resumed.

If the road was crossed by the railroad nearer at right angles it would be obstructed less. Considering the proximity of the railroad

the new road does not accommodate the public as well as the old one. The new road is as near the old road as it can be cleverly. A fence is between.

JOHN McCORD.

Sworn to and subscribed before us, April 10, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

April 10th, 1854, 8½ P. M. Examiners adjourned until 11th, at 9 A. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

April 11th, 1854. Examiners met at 9 A. M.

S. H. Metcalf, called by complainants, was sworn and testified as follows: I am 39 years of age, late a contractor, and reside in Erie City, Erie County, Pa. In 1852, from some time in April to October; I was freight agent on the Erie and Northeast Railroad; from October, 1852, to October, 1853, I had a contract for taking care of the freight, transporting it, you may say, on that road. In 1852 (summer), I was frequently over the road; over it in the summer of 1852 as often as once a week, and sometimes oftener. I am acquainted with the ground at the crossing of the Buffalo road by the railroad. The lower end I am not so much acquainted with, except from reputation. At Mills' the railroad occupies about from 30 to 40 rods in crossing (diagonally) from cattle guard to cattle guard. I think it a very great obstruction—a dangerous place for travellers and teams. I have seen teams running off a good many times, when I have been down on the road. I have never seen a team run a great ways—that is, more than a quarter of a mile. I have seen this frequently. The Buffalo road is much used for droving. It is the only road for that purpose from Erie to Buffalo. I have seen droves passing when the cars were coming up.

With wild cattle the trains frighten them a good deal. I have seen droves run there a mile, I should think; they get very much scattered. If a train were to come up while a drove was passing on that 30 rods, there would be some of them killed, unless the drovers were very careful. I saw one drove split in two there, that is, one half driven on one side of the track and the other half on the other. With an ordinary team in passing at this crossing, if the horses had got to the crossing, if the cars were one hundred rods off, I think a loaded team might get over before the cow-catcher would strike it. If the cars were 30 or 50 rods off when a loaded team was passing, if the team was a good one they might get over, but if a slow team they could not get over. The railroad cuts the Buffalo road in two

here, and makes a narrow place, and if a train was less than one-half a mile off, they would, in coming, get alongside of the team before it could get out of this narrow place.

Cross-examined by Respondents.

The railroad crosses the Buffalo Road at Mills' at grade, perhaps the rails are above grade, the ties at grade. I consider it a great obstruction, because it occupies so much of the highway in crossing, and in going east from that place the road runs in such proximity to the railroad that teams are liable to be frightened. These are my reasons for calling it dangerous. If the Buffalo Road was crossed more at a right angle, it would be less of an obstruction, but if crossed diagonally, as it now is, it could not be crossed so as to be less of an obstruction than it now is. From that point of crossing the railroad, I should think it straight for near six miles each way. It is straight from Erie to Moorhead's, from 10 to 11 miles. After you get on to the track there is an unobstructed view, with the exception of the rise and fall of the road (grade), for the distance of about six miles each way. Coming on the Buffalo Road from Erie east, there is, I think, no building or woods to obstruct the view of the railroad crossing, although I could not see the crossing until I got very near to it. Between the Harborcreek station and the crossing at Mills' there is one building, the school house, to obstruct the view of the railroad and crossing. I think it near one mile and one-half from Harborcreek station to the crossing. The school house is one story high, about 16 or 18 feet in height. I cannot say for certain whether it obstructs the view of the crossing or not, but I rather think it does. It is a level from the top of the Six Mile creek to the point of crossing, say from 40 to 60 rods, it may be more.

Re-examined by Complainants.

Question. Do we understand you to say that a person riding along on the Buffalo road near the crossing, has an unobstructed view of the railroad for six miles, east or west?

Answer. I do not wish so to be understood. If you stand on the track the railroad is straight each way; but if standing on the Buffalo road you can see but a short distance. I think you could not see more than a mile and one-half each way—there are several pieces of woods.

SAM'L H. METCALF.

Sworn and subscribed before us, April 11, 1854.

GEO. H. CUTLER,
JAS. SILL,
Examiners.

Rev. G. W. Cleveland, produced by complainants, was sworn and testified as follows: I reside in Harborcreek township, Erie County;

am 38 years of age, a minister of the gospel. I have lived in Harborcreek between four and five years; I am quite well acquainted with the Buffalo road through Harborcreek township. I have travelled it frequently. There is a large portion of the Buffalo road occupied by the railroad, near Mills', east and west. The railroad does not cross at right angles, hardly diagonally, it occupies a portion of the road. From the manner of its occupancy of the Buffalo road, I regarded it as an obstruction to the free use of the Buffalo road. I regard it as such, because those who pass are in danger; horses that pass are liable to be frightened; persons are hindered and liable to be run over. The passage-way each side of the railroad is narrow; but it is not the width of an ordinary road I should think. I have not witnessed any accidents. There is a portion of the Buffalo road occupied by the railroad at another point.

Cross-examined by Respondents.

The railroad crosses the Buffalo Road at Mills' at grade or nearly so. In saying that the railroad does not cross the Buffalo Road diagonally, which is 45 degrees, I mean that it does not cross it so large an angle: it runs more with the road. It is my opinion (merely opinion) that the railroad, in crossing the Buffalo Road at Mills'; occupies from 3 to 500 feet.

Question. The railroad crossing at Mills' at the angle it does, could it cross so as to cause less obstruction than it now does?

Answer. I think that it could not. When at the point of crossing on the track, there is an obstructed view as far as the eye can reach, each way. When approaching the crossing, you are able to see the cars but a very little distance. In approaching from the east, you can see west not further than one-quarter of a mile. There is nothing to obstruct the view of the cars from Harborcreek station to the point of crossing, if observer is between those points. I should not think it more than a mile, if that, from Harborcreek station to the point of crossing. If travelling from Mills' to Six-mile Creek, there is nothing to obstruct the view of the railroad for that distance; when you get there, the mill obstructs, and other objects. Travelling from Harborcreek station, on the Buffalo Road, to the point of crossing, there are buildings and other objects which intercept the view, and prevent one from seeing the railroad cars coming from the west until they are crossing or have crossed the bridge; it is but a very little ways that you can see them.

Re-examined by Complainants.

If I were passing from Erie, on the Buffalo Road, east, if going down the hill from Six-mile Creek, and on nearly to the crossing, as I pass on, not seeing the cars, I may be very near the crossing, and see the cars coming; I would not be able to get back nor to go forward. In coming from the east, you cannot see the cars, except for

a little distance. From Harborcreek station to Mills' is one mile, and a carriage on that part is not able to get out of the way. I have myself been in that position, and have had to drive into barnyards, private lanes, &c. The horses are frightened, and I have had to get away, in order that my horse would not be frightened by the cars.

GEO. W. CLEVELAND.

Sworn and subscribed before us, April 10th, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Anthony Saltsman, produced by complainants, was sworn and testified as follows: I reside in Mill Creek, a farmer, and 52 years of age. I am acquainted with the Buffalo Road, and have travelled it for 30 years. There is a great amount of travel on it. The railroad strikes the Buffalo Road (what was the road) a few rods east of Harborcreek (or Elliott's Run). This is the most eastern point of contact. I here occupies the road, I should think, for 80 rods. I think that they are not separated for that distance, they either touch or lap on. The Buffalo Road is entirely obstructed for that distance. It is a little over half mile: perhaps three-quarters from the place where it Buffalo Road to where it crosses on to it again. It strikes it nearly opposite Mr. Wagner's; it is a little east of Wagner's house, and east of Mills'. It crosses there at an angle of about 6 degrees, as near as I can estimate it. That carries it along the road for about 25 rods. Independent of the use of the railroad, it is some obstruction; considering the superstructure and use of the railroad, I consider it a very great obstruction, good as it is. I cannot say how often the cars pass over the railroad daily. I believe they are irregular (the freight trains). From the old borough of Erie to the Six-mile Creek is a level country, keeping north of the Buffalo Road 60 or 70 rods, from Erie to Moorhead's, we would call that a level country. By this route, running from Erie to Jos. Y. Moorhead's, the Buffalo Road could be crossed near Moorhead's at nearly right angle. At Moorhead's there is a gulf. The railroad now runs a little more than half a mile, I think, south of Jos. Y. Moorhead's. Between the crossing place at Moorhead's and the crossing place at the 16 mile Creek, the country east, so far as I am acquainted with it, is pretty level. If the Buffalo Road was to be crossed, I would say cross it a little over a mile this side of Moorhead's, as the ground would be more favorable for a railroad, and cross the Sixteen-mile Creek where it is now crossed. By this route there would, perhaps, be a little heavier grade on one mile, and the road would not be quite so straight. I have been long and intimately acquainted with the country this side of Moorhead's. I lived in Harborcreek until I was about 34 years of age, and in Millcreek ever since.

Cross-examined by Respondents.

I should judge that the railroad crossed the Buffalo road at Mills' at grade. If crossed at Mills' at its present angle, I don't know that it could be crossed so as to be less obstruction than it now is.

Question. You state you consider the crossing at Mills' a very great obstruction; please state in what it consists.

Answer. In the first place, in going from Six-mile Creek east, you can see the cars coming from the east until you get within 25 or 30 rods of the crossing. In crossing it, if you are not very careful, the wheels will get into the track. My buggy wheels are just four feet ten inches, and got in there, and I did not get them out until one of them got on to something. The fences, shade and fruit trees prevent you from seeing the road for some distance. There is a new road built north of the Elliott's. It is a straight and rather more level road than the old Buffalo road—both roads were good. If there was no railroad there, the new road would accommodate the travel as well as the old road. As the rails are upon the ground I think that they are laid across the old road twice. At the point where the railroad comes on to the old Buffalo road, an embankment might be made alongside of the railroad for use as a road. If so made, the road would be much more dangerous to travel than the new road.

Q. You say the country is level from the old Borough of Erie to the Six-mile Creek. I wish you state at what point north of the present located railroad you contemplate striking the Six-mile Creek.

A. You may strike the Six-mile Creek at any point north of the present railroad, within 50 or 60 roads, and have a level country. I don't know the extent of the gulf (over the said creek) at that point. I think it not larger than where it now strikes. It is a level country from the Six to the Twelve-mile Creek—it would strike the Twelve-mile Creek about 80 or 90 rods, may be more, north of the present Buffalo road. It is a little leveller there than it is on the Buffalo road. There is a little over a mile this side, west of Joseph Y. Moorhead's, something of a gulf across; there would be a small gulf; there is a little ravine comes down there. It would depend something on your route. It might, in crossing the Buffalo road, have to cross at an angle, which I cannot say how large it would be. I could not say that there would be a less obstructed view than there now is. I cannot say whether the road would cross the Buffalo road at that point, at below or above grade. I do not know whether there would be a hill on the route between this point and the Sixteen-mile Creek or not. I have never looked over this route with a view to the location of a railroad. I never followed that direction. The route I indicate would cross the Buffalo road in Harbor Creek Township, near Wm. Scott's.

A. SALTSMAN.

Sworn and subscribed before us, April 11th, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Dr. Ira Sherwin, produced by complainants, was sworn, and testified as follows: I reside in Harbor Creek Township, Erie County, am 57 years of age, and am a farmer and physician. I have resided in Harbor Creek 28 years; am well acquainted with the Buffalo road; have travelled it frequently. My house is 34 rods from the railroad track, which is that distance south of me. The Buffalo road is very much travelled, the only thoroughfare between Erie and Buffalo. The railroad first comes on the Buffalo road at a point near Elliott's and Stillman's, east of the Harbor Creek bridge. The centre of the railroad bridge is the centre of the Buffalo road. Railroad crosses the Buffalo road between Stillman's and Elliott's. Going from Stillman's to Plara Elliott's, the Buffalo road bears south, and leaves the railroad to the north near Plara Elliott's. Between Stillman's and Gilbert Elliott's, I think 70 rods of the Buffalo road, as I estimate it, is taken up, entirely obstructed and fenced by the railroad. The next obstruction is east of Wagner's house (east of Mill's). It crosses the Buffalo road there diagonally. I should estimate that there the two roads lap on each other from 75 to 80 rods. In crossing, I should estimate that it occupied 30 rods. It obstructs the free use of the Buffalo road. The track superstructure, irrespective of its use, is an obstruction to the road. With the use and track, I consider it a very serious obstruction to the use of the Buffalo road. I have knowledge of disasters at that place from this cause. There *have* been about as many accidents between Stillman's and Elliott's (from proximity to the railroad) as immediately at the crossing. I have been called several times to see people that have been injured. Stillman's is about 30 rods east of Elliott's, between Mills' and Wagner's; at the crossing place, I know of accidents having occurred. I know of more than a dozen having happened since the railroad has been placed there.

The accidents were generally from the horses having taken fright, but not all. I saw a man going across with a wagon, loaded with plaster; his wagon broke, because the wheels did no go square across; they slipped; it was last spring. I can only call to mind at this time three persons whom I have been called upon to attend, but I have known of more than a dozen of accidents caused by the railroad.

In saying this, I meant breaking wagons, injuring horses and persons.

Cross-examined by Respondents.

Q. You have stated in your examination in chief, that you consider the track an obstruction to the road. State, if you please, in what.

Answer. From some time after the construction of the road, until the relaying, the ties were above the road and the rails were above them; there were two places for crossing—one about 24 feet wide, the other 16 feet. They were of plank, some 15 rods apart. A

person in the night was liable to go to the wrong place, and not hit the crossing, and get into the ties and rails. Last winter, when the rails were relaid, there were planks laid along on each side of the rail—that is one plank on the outside, and one on the inside for the whole distance.

In one place there is a crossing of plank 12 feet wide. Now persons travelling are liable to get into the track between the rails. In the night-time, it is very difficult to get the right place to cross.

Q. You stated in your examination in chief, that you considered the track, superstructure, and use of the railroad a very serious obstruction; state, if you please, in what.

A. The running of the cars upon the road frightens the teams frequently. People travelling the road have frequently to turn out of the Buffalo Road into private lanes, to keep their horses from being frightened, my lane in particular, and Mr. Wagner's barn yard are so used. I have known droves to have been frightened, and run a mile. One drove this spring, a part had got over, and a part had not. That part that got over took fright, and run, I can't say how far, for I could not see but 60 or 70 rods. Last fall a drove of cattle was passing, and the cars held up until they had got by. After the cattle had got by, the locomotive blew the horn and scared the cattle, which broke through my fence, ran into my premises, broke an axletree before my house, also a wire fence, and it was with a good deal of trouble, that they were got tame, so that their drivers could get them along again. The old Buffalo Road is crossed twice by the railroad, between the bridge over Harbor Creek stream and Gilbert Elliott's. There is a new road north of Gilbert Elliott's, which is used by the public. This new road is north, right beside of the railroad.

Re-examined by Complainants.

The new road (last mentioned) was not laid out by the township. The old Buffalo Road has never, to my knowledge, been vacated. I was Path Master, up to last spring, for three or four years. Persons cannot pass with teams at all while the cars are on the crossing at Mills'. When they have on 15 or 16 cars they occupy the whole space—sometimes they are shorter. During the time that the trains are passing it would be a total obstruction. *There is a general fear in the public mind regarding this crossing. The inquiry is, when are the cars expected?* I have known the cars to go along there 17 time in 24 hours. The greater proportion in the daytime. I think that there are not so many usually, I cannot say exactly how many usually pass, as I never counted but the one day.

IRA SHERWIN.

Sworn and subscribed before us, April 11, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Examiners adjourned until Wednesday, April 12th, at 8 o'clock A. M.

GEO. H. CUTLER,
JAS. SILL,
Examiners.

April 12th. Examiners met at 8¾ A. M., on Thursday.

Samuel Low, produced by the complainants, was sworn and testified as follows:—

I am a civil engineer, city surveyor, reside in Mill Creek Township, Erie County, and am 62 years of age. I made a partial survey of that part of the Erie and Northeast Railroad and Buffalo Road, in Harbor Creek Township, but not a very accurate one. I made it to ascertain whether the railroad track was torn up off from the Buffalo Road. It was made some time in December, 1853. I got at it as well by the notes of survey of Buffalo Road in the Prothonotary's office, as by my own surveys on the ground. The distances marked up on this diagram, marked with deponent's name, I believe to be accurate, to be an accurate representation of the roads as they exist on the ground. The representation of the roads as laid down upon the diagram (marked with my name and "Exhibit A"), I believe to be accurate.

Cross-examined by Respondents.

From my survey I found that the railroad crossed the old Buffalo Road by P. and G. Elliott's, as represented on the diagram. The figure "8," opposite Elliott's, on the diagram, represents the number of rods. I found the railroad did not interfere with the crossing at this place.

Re-examined by Complainants.

I think that the railroad does not interfere with the Buffalo Road for that distance between those points. This diagram represents about one mile and three-quarters, including everything on the draft, Elliott's Spillman's and Miller's.

SAMUEL LOW.

Sworn and subscribed before us, April 12th, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Wm. W. Davidson, produced by the complainants, was sworn and testified as follows: I am a farmer, reside in Harborcreek, and am 38 years of age. I have for the last twelve years been accustomed to travel the Buffalo road frequently—some before that. The railroad first comes on to the Buffalo road, between Stillman's and Elliott's. I cannot state the distance, as I have never measured it. Between Plara and Gilbert Elliott's the railroad occupies from 25 to 30 rods of the Buffalo road. Near Mr. Mills' and Mr. Wagner's I

think the two roads interfere some 70 rods. The railroad crosses the Buffalo road there (Mills') diagonally. The roads are open and together there some 50 rods, and there is a space for crossing some 12, 14 or 15 rods. At the crossing there are planks on the outside and inside of each rail for that distance (14 or 15 rods). The other portion is open. I think that the railroad crossing there interrupts very much the free use of the Buffalo road.

Cross-examined by Respondents.

The railroad crosses the old Buffalo road once between Stillman's and Plara Elliott's, and once between Plara Elliott's and Gilbert Elliott's. Between the crossings (of plank each 14 or 15 rods wide) the road is not gravelled up even with the plank except at one place, 16 feet. The railroad crosses the Buffalo road at that place at or nearly at grade.

Question. You state, in your direct examination, that the railroad interrupts very much the free use of the Buffalo road at that place (Mills'). I wish you to state in what way the interruption consists.

Answer. In the first place, the cars frighten animals, droves, and teams. I consider, in the next place, that the superstructure itself is a dangerous obstruction. Wagons, in crossing, are liable to get broke. Teams and droves are in danger of coming in collision with the cars and being detained.

Re-examined by Complainants.

Teams, droves and persons cannot pass there while the cars are passing. The cars pass there frequently on each day except Sundays, and sometimes on that day.

WM. W. DAVIDSON.

Sworn and subscribed before us, April 12th, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

G. H. Wagner, produced by complainants, was sworn and testified as follows: I am a farmer, reside in Harborcreek township, Erie County, and am 42 years of age. I reside some 80 feet from the Buffalo road. The railroad crosses on the Buffalo road some 8 or 10 rods east of me; it may be more. There are 52 rods there between the cattle-guards, in which the two roads are one. I had occasion to chain that road (having charge of it), and there is between 75 and 80 rods that the two come together, the railroad encroaching on the highway. A little beyond this, say six rods, the earth has been taken from the highway to build the embankment for the railroad. The west part of that road is some 12 rods of it from 12 to 15 inches higher than the old Buffalo road, which makes the water collect there and make bad places, damming the water in the Buffalo road. I should call the superstructure in various ways an obstruction to the use of

the road. As used it is a pretty serious obstruction to the free use of the road, because there are delays and waiting until the trains pass. I know of accidents happening there. They have been pretty frequent, but not so frequent (since they have put a watch on) as they were theretofore. I am a township officer (path master), and have had charge of that portion of the road the past year.

Question. Can the Buffalo road to the extent of 52 rods on which the railroad is wholly on it, be used as a common highway?

Answer. The Buffalo road cannot be used. The accidents I allude to have happened in consequence of the railroad being there, and have happened to people travelling the Buffalo road. 12 to 15 rods of the 52 so occupied are planked, and can be travelled, but not freely. The other 37 or 40 rods cannot be travelled.

Cross-examined by Respondents.

Question. Does not the railroad cross the Buffalo road at or near grade?

Answer. For 12 or 15 roads it does.

Q. Was it not for that distance planked with one plank on each side of the rail and gravelled up?

A. it was. This was done when it was relaid in the month of February last. Crossing the Buffalo road at that place at the same angle it now does, it could not cross so as to be less obstruction than it now is. The earth taken from the road for the embankment, was taken from the edge of the turnpiked bed, making a square edge which has crumbled in. This place was 3 or 4 feet below the bed of the road. The cars can be seen west as far as the saw mill, about half a mile, that is in a clear day. East, when on the track, you can see down to Miller's, sometimes as far as the eye can reach. Travelling east on the Buffalo road you cannot see the cars until you are within 30 rods of the crossing. From the top of the Six Mile creek hill you cannot see the cars (to the east), as far as to Miller's. My barn intercepts, also the orchard, and if they were away probably Elliott's house would intercept the view.

Q. Is not the land cleared both sides of the Buffalo road and the railroad from the Harborcreek Station to Six Mile creek?

A. It is. Travelling on the Buffalo road towards the east, and when 30 rods from the crossing, you cannot see the cars further than from 30 rods to 50 rods east from Gifford's, the cars coming west.

Q. When on the west end of the Buffalo road where the railroad crosses, how far east of the east end of the crossing can you see the cars?

A. I don't know that I have noticed it. I cannot say how far.

G. W. WAGNER.

Sworn and subscribed before us, April 12, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Philip D. Bryant, produced by complainants, was sworn and testified as follows: I reside in Harborcreek township, Erie County, am a farmer, and 40 years of age. I removed there in November, 1840. I know the track and location of the Buffalo road very well. I was Road Commissioner in 1849, and continued such about 18 months. I was Road Commissioner at the time the railroad was located and about being constructed there. The first interference is east of Harborcreek (Elliott's run), from 2 to 4 rods, it may be more. I should think the railroad bridge to be just about in the centre of the old Buffalo road. The first time it crosses there, it runs along there some rods. This diagram "Exhibit A," I suppose to be correct. It again strikes it after passing Plara Elliott's house between there and Gilbert Elliott's, and crosses the old road there. There was a notice written and signed on the 14th of November, 1849, and served the next day or the next but one, on Giles Sandford, Esq. (an officer of the railroad company), by me. This is the notice (marked Exhibit "B" and signed with my name), a duplicate copy of which I gave to Mr. Sanford. I think Mr. Sanford was at that time secretary of the company. No alteration was made in the location of the road by the company. They paid no regard to it. The space between the points mentioned in the notice covers all the ground occupied by the railroad on the old Buffalo road. The duplicate notice served on Mr. Sanford was signed at the same time by Mr. Robert Moorhead, as well as myself. We were both Road Commissioners of Harborcreek Township. The railroad takes the two first portions of the Buffalo road from Elliott's east exclusively. It is impossible to get on to it—it is fenced off. Cattle guards are put there to keep you off. Coming from the east, the railroad comes into the Buffalo road a few rods east of Wagner's and goes on it about 56 rods, that is from cattle guard to cattle guard, where it is entirely open, the two in conjunction. I never measured it but have stepped it along and counted the fence panels. In its present situation, and ever since the railroad was made, without any cars, the superstructure and road were an obstruction, for in crossing if you did not hit the plank you would come on to the rails. When re-laid in February last, it was gravelled between crossings. There is now a planked crossing twelve or fifteen feet wide. The gravel is not now there. The whole height of the rails is above ground, and in going against it, you have to meet the whole force of the height of rails. The gravel is all gone. The ties are on a level (their upper surface with the earth. As used the road is a great obstruction, owing to persons being delayed, any person coming across when the cars are passing is in imminent danger, and you cannot see the cars either way, until very near the crossing. The railroad crosses the Buffalo road diagonally, and the angle is such that you cannot in approaching see the cars until you are very near the crossing. In coming from the west, Mr. Wagner's buildings are in the angle so as to obstruct the view of the cars, and when you are coming from

the east it is reversed, and Mills' buildings obstruct the view. Every body has to drive up close to the crossing to see whether the cars are coming or not. It has been so since the construction of the railroad. You cannot drive along or across in this 56 rods occupied except at the one point planked, which is the only place of crossing. It is dangerous there because you may break your wagon and spoil your load, and because of the cars coming along. I saw a sleigh broken there. The runners spread out and let it down. I hear of accidents there in consequence of the cars coming along, but do not see many, as I do not live there. I have seen accidents of horses frightening there and breaking away, and the accident of the sleigh which I have mentioned. The Buffalo road is also known as the ridge road, probably by that name from Cleveland to Dunkirk.

Cross-examined by Respondents.

For about one-half of this crossing the railroad is at grade—the western portion is above grade. A part beginning to rise at grade, rises until at the western cattle guard it is from 15 to 18 inches above grade. This is my opinion. The principal part of the occupied portion of the Buffalo road is at grade (except that the rails are above grade). As the railroad now crosses it could not cross so as to be a less obstruction than it now is.

Q. While you were Road Commissioner of Harbor Creek Township, did you ever serve a written or verbal notice on the railroad company to put the crossing in better repair?

Answer. I did not.

Q. State whether if the crossing was approached by the railroad so as to be nearer a right angle, would the view of the cars be better or the danger less?

A. The view would be better and the danger less.

Re-examined by Complainant.

Q. Could not the crossing at the place spoken of have been so constructed as to have been less obstruction than at present, or it has been?

A. So far as the superstructure is concerned it could have been, by planking and gravelling up, so as to have made it smooth.

P. D. BRYANT.

Sworn and subscribed before us, April 12th, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Robert Moorhead, produced by complainants, was sworn, and testified as follows: I reside in Harborcreek township, Erie County, am a farmer, and 66 years of age. I have resided there 49 years, am well acquainted with the Buffalo road, and have until lately tra-

veled it frequently. I do not now, because I am afraid to drive a team myself on account of the cars. I signed the notice to the railroad, marked as "Exhibit B," and signed on the back by me. I am acquainted with the Buffalo road, where the railroad crosses it at or near Mills'.

Q. Are you acquainted with the manner in which the railroad occupies and crosses it at or near Mills'? if so, state whether it is an obstruction or not to the free use of the public highway by the public.

A. I say it is an obstruction—a serious obstruction. It is dangerous crossing if the cars are there.

Cross-examined.

Q. In what does the serious obstruction, in crossing at Mills', consist?

A. In scaring horses, breaking wagons, endangering men's lives.

Q. Did you, as Commissioner of Harborcreek, serve a written or verbal notice on the railroad company to put the crossing in better repair?

A. I did not.

ROBERT MOORHEAD.

Sworn and subscribed before us, April 12th, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Marcus Lewis, produced by complainants, was sworn, and testified as follows: I reside in Harborcreek township, am a farmer and lumberman, and 47 years of age. My business leads me to travel the Buffalo road to Erie frequently, probably more frequently than any other man does travel it, that is taking the whole distance. I reside 10 miles from Erie. I was supervisor of the road, and three years before 1843, and had the whole control of it, and am well acquainted with it where the railroad crosses it at Mills'.

Q. State whether the railroad and its use is an obstruction, great or small, to the free use of the public road as a highway.

A. I think it is a very great obstruction.

Q. State if the superstructure and rails, without the use, would not be an obstruction to the free use of the Buffalo road as a highway.

A. It would very much. When it was first constructed, the rails, ties, and all were pretty much above ground; some of the ties were half under ground. This was before it was gravelled. The whole rail is now above ground, except in one place where it is planked. The planked crossing is about 16 or 18 feet wide. For from 12 to 16 rods there is a plank on the inside and outside of the rail. I never measured it, but think it such. Between the inner planks

(on the inside of the rail) the space is not filled, but is on a level with the ties, and you cannot cross there except at the one spot. Except this one spot (crossing) the road cannot be used as a public highway; if gravelled up it could be used. I consider the obstruction very dangerous, the cars crossing have run my horses into the fence, on both sides of the road. A part of the space occupied is above grade. It rises towards the west, and at the western cattle guard the rails are, I should think, two feet above grade. It makes a muddy place along the side a good while. The railroad keeps the water from running off. Where it is above grade, it is a place where they do not travel.

Cross-examined by Respondents.

Q. Does not the railroad cross the Buffalo road at Mills' at grade?

A. When the railroad was made, part of the ties were put down into the ground, and part were put on top of the ground, some partly in the ground; they filled in dirt between the ties in some places; it would be pretty nearly at grade; when it was relaid, they filled it all up between the ties.

Q. You say in your examination in chief that the road and its use is a very great obstruction; state in what this consists.

It consists in stopping teams, having to wait until the cars pass, scaring cattle, frequently horses scared. I have seen a wagon broken myself, but never saw any person injured. If the railroad between cattle guards was planked and gravelled up, it could be crossed as well as where we now cross, but at one end near the western cattle guard there would be an embankment, which, however, is out of the usual travelled way. I never served a written or printed notice on the Erie and Northeast Railroad Directors to put their crossing in better repair.

MARCUS LEWIS.

Sworn and subscribed before us, April 12, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

April 12, at 1 P. M. Examiners adjourned until 2 P. M.

JAMES SILL,
GEO. H. CUTLER,
Examiners.

2⅛ P. M. Examiners met and proceeded.

C. F. Kendrick produced by complainants, was sworn, and testified as follows: I reside in Harborcreek, in which I have resided in the place now occupied by me on the Buffalo road 10 years. Am an agriculturist, and 60 years of age; I am well acquainted with the

Buffalo road, and have travelled frequently heretofore. I am acquainted with the Buffalo road where the railroad crosses, and goes along it at near Mills' and Wagner's.

Q. From your knowledge of the place where the railroad crosses at Mills', and of the manner of crossing the Buffalo road, state whether the same is an obstruction, and to what extent is it an obstruction to the said road?

A. It is an obstruction, and a very grievous one, and it passes so obliquely that it renders the observation of any approaching danger, by reason of the railroad extremely difficult in approaching the crossing from the eastward or westward.

Frequently in travelling that road (which, however, I have given up travelling with a horse and wagon on account of the railroad, and commonly go on foot), the velocity of the cars is so great that they come upon you quite imperceptibly. By reason of that, any person attempting to cross that road is in imminent danger. I have never been an eye witness to any accident there; I only know of them by hearsay. Teams frequently get frightened; I have seen horses running away, and I was quite apprehensive of danger.

Q. Is the construction of the road an obstruction to the Buffalo road in the manner in which it crosses at that place?

A. It is an obstruction inasmuch as the diagonal width of the railroad precludes travel on the part so taken up, and there is only a width of 16 or 18 feet made available for travel.

The balance of the road, except the part so occupied, cannot be used without inconvenience. It cannot be used as well as the other part of the road, nor anything like it. The passage way of 16 or 18 feet spoken of is at right angles with the railroad track.

Q. State whether there is difficulty in crossing the railroad at any other point within the said occupancys.

A. There is a difficulty as any person may suppose in crossing an elevation with a loaded team at any angle, for when the wheels come in contact they naturally draw off in the way the elevation inclines them. Indeed, I would say that the road in that shape would be more difficult of passage than any road, no matter how bad if in any state of repair.

Cross-examined by Respondents.

The railroad crosses the Buffalo road nearly at grade, except, I think the western end is rather the lowest. I only speak from observation.

Q. You have stated that the crossing of the Buffalo road was a grievous obstruction, and assigned as one reason why, the oblique manner in which the railroad approaches the Buffalo road; state whether it would be a less obstruction if approached at a more direct angle.

A. I think it would be less.

Q. You have stated as another reason why it is an obstruction

because you could not see the cars as you approach; state whether you could see them better if you approach more directly.

A. I might possibly, because impediments which are now in my way, might then be out of the way. But now in crossing the road the cars which have been intercepted by trees, or some object have come on to me unawares.

Q. Could the railroad cross the Buffalo road as it now does so as to be a less obstruction than it now is?

A. If it was a dernier resort. I don't think that you could do any better. So far as the forests are concerned it is a cleared country from the Harborcreek station to the Six-mile creek. It is not a forest, but there are trees of another growth, orchards, &c.

Q. Is there an orchard or trees of another growth (to intercept the view), from Harborcreek station to the crossing at Mills'?

A. There are a variety of trees and shrubs. There are such on John Hampson's farm, and Miller's farm, and probably others. I don't recollect exactly recollect now. There are trees between the Buffalo road and the railroad, between the crossing and Harborcreek station.

Q. From the crossing to Six-mile creek, I wish you to state what apple trees, or trees of another growth are there to intercept the view?

A. There are some trees on Mr. Twitchell's farm that partially intercept, but I do not mean to say that they wholly intercept.

Re-examination by Complainants.

Q. Would not the crossings as it now exists, be a less obstruction to the Buffalo road if it was planked and graded the whole distance of its occupancy of that road?

A. Undoubtedly it would.

CHAS. F. KENDRICK.

Sworn and subscribed before us, April 12, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

James M. Moorhead produced by complainants, was sworn, and testified as follows: I reside in Harborcreek, a farmer, and 60 years of age. I have resided in Harborcreek 53 years next June. I am acquainted with the Buffalo road where the railroad crosses it; I have known that place these 50 years; I have travelled it very frequently, and am well acquainted with the manner in which the railroad crosses it.

Q. State whether the crossing of the Buffalo road by the railroad is an obstruction to the passage of the Buffalo road as a public highway?

A. I think it is a very great obstruction.

Cross-examined by Respondents.

Q. You have stated in your direct examination that you consider the railroad a very great obstruction; state in what that consists.

A. The greatest obstruction, I think, is in crossing the road so nigh the way the road runs. It is an obstruction, because it is higher than the Buffalo road. I don't know as I have any other to speak of. The railroad crosses the Buffalo road very nearly at grade at that place.

Re-examined by Complainants.

Q. Is it at grade all the way from where it comes on to where it leaves the road?

A. It is not.

Q. What portion is above grade?

A. It is above grade at one end, but I cannot say exactly what proportion is above, probably one-third.

Q. State what experience you have had of this as an obstruction?

A. Betwixt the railroad and the plank on the inside, there is a space, or vacancy of about 3 inches, and when the wheel gets into this space, the horse cannot easily raise it up. If you have a load on, it cannot be raised up.

JAMES M. MOORHEAD.

Sworn and subscribed before us, April 12, 1842.

JAMES SILL,
GEO. H. CUTLER,
Examiners.

John Rice, produced by the complainants, was sworn and testified as follows: I reside in Harbor Creek, am a farmer and mechanic, and 51 years of age. I have resided in Harbor Creek since June, 1811. I am acquainted with the Buffalo road, and have, during the summer season, travelled it two or three times a week, for the past two years. I have been acquainted with the Buffalo road ever since 1811. I am acquainted with the manner in which the railroad crosses and occupies the Buffalo road in the vicinity of Mills'.

Q. State whether or no the manner in which the railroad there crosses and occupies the Buffalo road is an obstruction to its free use as a public highway.

A. I consider it a very great obstruction.

Cross-examined by Respondents.

Q. In what does that very great obstruction consist?

A. It consists in timber and railroad iron being laid above its grade.

Q. Does the railroad cross the Buffalo road there at grade?

A. I think it don't, except that at the east end there are a few feet at where we have to cross.

Q. How much is the balance of it above grade?

A. It will average from three inches (the thickness of the rails), to two feet.

Q. Is there any part of it 2 feet upon the travelled part of the Buffalo road?

A. There is within the bounds of the Buffalo road.

Re-examined by Complainants.

Q. You have stated it as a great obstruction because of the iron and timber laid on the road. Is there any other reason why it is an obstruction?

A. The running of the cars is a very serious and dangerous obstruction to the travel of the Buffalo road.

JOHN RICE.

Sworn and subscribed before us, April 12, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

John Mills, produced by complainants, was sworn and testified as follows: I reside in Harbor Creek, near the crossing, and 58 years of age; am a farmer. I have been acquainted with the Buffalo road more or less since 1815. I have travelled it frequently (while I have resided where I now do), for 16 or 18 years. I am very well acquainted with the place where the railroad crosses the Buffalo road. I reside at the crossing.

Q. Please to state whether the manner in which the railroad crosses and occupies the Buffalo road near your residence, is an obstruction to its free use as a public highway.

A. I consider it a serious obstruction. It lies almost in the direction of the Buffalo road, and it occupies the Buffalo road for some rods. The way the road is laid and planked, a good deal of it is in the centre of the road. The running of the cars is a great obstruction. The iron and timber would not be so much if that was all.

Q. Do you know of any accidents there occasioned either by the track or running of the cars? If so, state what knowledge you have, generally.

A. There have been within my knowledge some six or seven (somewhere along there) carriages, sleighs and wagons broken by crossing on the irons. Excepting in one case, these were all in crossing. A man was coming along in a carriage with his wife and child, and the cars were coming, the man was some hurt. I have seen a great many there have difficulty with their horses on account of the cars; I have had frequently to let them into my gate. Droves often get frightened and break through the fences into the adjoining lots, and sometimes run among horses and carriages passing, endangering them.

Q. From your knowledge of the locality there, state whether you consider it dangerous crossing on the Buffalo road at that place.

A. I consider it very dangerous. I don't think that there is a person driving on the road with a team, but what is in terror all the time.

Cross-examined by Respondents.

Q. You have stated that you considered the crossing by the railroad very dangerous. State whether your reasons for considering it dangerous are not the same that you have for considering it an obstruction.

A. The reasons are the same. Where the railroad hits the Buffalo road, on the east, it is at or near grade, it gradually rises towards the west, and is about two feet at the western cattle guard, where it leaves the Buffalo road.

JOHN H. MILLS.

Sworn and subscribed before us, April 12, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

George Nelson, produced by the complainants, was sworn and testified as follows: I reside in Harbor Creek, am a farmer, and 50 years of age. I have resided there 17 years. I have travelled the Buffalo road frequently, and been acquainted with it since 1836. I am acquainted with the manner in which the railroad crosses the Buffalo road at Mills'.

Q. State whether the manner in which the railroad there crosses and occupies the Buffalo road is, or is not, an obstruction to its free use as a public highway.

A. It is an obstruction, and a serious one too. I think it renders the use of the Buffalo road, as a public highway, dangerous to all public travel.

Cross-examined by Respondents.

Q. You have stated that you considered the crossing of the Buffalo road, by the railroad, a serious obstruction. I wish you to state why you consider it a serious obstruction.

A. I consider it a difficult place to cross, on account of the angle at which it crosses; also on account of the irons and running of the cars.

Q. You have stated that you consider it very dangerous—why do you consider it so?

A. On account of the cars catching anything that would be on the track, or nigh the track.

Q. Could the railroad cross the Buffalo road as it now does at that place, and be a less obstruction than it now is?

A. Not unless you took it away from there.

Re-examined by Complainants.

Q. State whether or not it would not be less obstruction than it is if it were planked and gravelled up between the planking, throughout the whole length that it occupies the Buffalo road.

A. I would suppose that it would be better. The change of gauge from 6 feet to 4 feet 10 inches, allows a wagon to get in between the rails. I never got mine in there, but I believe one of my neighbors did. When they get in there, it is almost impossible to get out; you have to lift it out.

GEORGE NELSON.

Sworn and subscribed before us, April 12, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Gilbert T. Elliott, produced by complainants, was sworn and testified as follows: I reside in Harborcreek; am a farmer, and 39 years of age. I was born and raised within a few rods of where I live, and have been acquainted with the Buffalo road from infancy. I travel it quite frequently. I am acquainted with the manner in which the railroad crosses and occupies the Buffalo road, in the vicinity of Mills'. I live about one-half a mile from there.

Q. State whether or not the manner in which the railroad there crosses and occupies the Buffalo road is, or is not, an obstruction to its free use as a public highway.

A. I consider it to be a very great obstruction to the free use of the road.

Q. State whether or no the crossing of the Buffalo road, by the railroad, renders the use of the Buffalo road dangerous to persons travelling on it.

A. I consider it does.

Q. Do you know of any injuries to persons or property from the railroad crossing there?

A. I believe a span of horses to have run off from fright at the cars, as I helped stop a span, and saw a buggy which had been broken to pieces.

Q. State some of the reasons why you consider the railroad an obstruction to the Buffalo road.

A. From the fact of its running in the Buffalo road, in the open space for about 52 rods, from one cattle guard to the other, taking that distance to cross the Buffalo road. West of the west cattle guard, towards the 6 mile creek, it encroaches on the 50 feet of the Buffalo road for about 23 rods, as near as I can tell. I measured it with a chain; and you have to drive about half a mile (being a quarter on each side of crossing) alongside of the railroad, after you get over the crossing, and there is nothing to keep you from running on

to the cars if the horses are frightened, except a little fence. You cannot see the cars until you get pretty near the crossing, when you are going east—Wagner's barn is in the way; and if going west, Mills' house is in the way to prevent you from seeing the cars.

Q. Is there any other difficulty about crossing?

A. I think it might be improved. In the night a person is liable to have his wagon wheels entangled. If the wheels get in between the rails, with a load, it would be very difficult to get out.

G. T. ELLIOTT.

Sworn and subscribed before us, April 12th, 1854.

GEO. H. CUTLER.
JAMES SILL,
Examiners.

Joseph M. Moorhead, being produced and examined on the part of the complainants, testified as follows: I reside in Harborcreek; am a farmer, and 36 years of age. I reside four miles east of the crossings. Have travelled the Buffalo road often; have been acquainted with it since I was old enough; am acquainted with the manner in which the railroad crosses the Buffalo road in the vicinity of Mills'.

Q. State whether the manner in which the railroad there crosses and occupies the Buffalo road is, or is not, an obstruction to its free use as a public highway.

A. I should think it a very dangerous obstruction; it is an obstruction, because the coming along of the cars scare the teams, endangering the lives of travellers, and their having to be very careful in crossing at right angles to get over safe.

Q. Have you any knowledge of injury to persons or property at that crossing?

A. My horses run away with me once there; they got away from me, and threw me out of the buggy. I met the hand car at the crossing. I could not see it on account of Wagner's barn till I got very close; my horses got frightened by the hand car.

JOSEPH M. MOORHEAD.

Sworn and subscribed before us, April 12th, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Examiners adjourned at 6 P. M., April 12th, to Thursday, April 13th, at 9 A. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Joseph Deemer, produced by complainants, was sworn and testified as follows: I reside in Erie City, where I have lived thirty-five years. I am High Constable of the city, and 65 years of age. I am acquainted with the manner of the Erie and Northeast Railroad coming into the city. It crosses Ash Lane, one-half of which belongs to the city, also Parade, German, Holland, French, State, Peach, and Turnpike Streets up to Sassafras Street, which is their line. In crossing Ash Lane it only obstructs by the irons (crossing that lane at grade). It crosses Parade Street nigh grade, nothing but the irons obstructing. The running of the cars on Parade Street obstructs, by their liability to frighten the horses of travellers on that street. The railroad passes German Street, where the land is low. It is thrown up there about 3 feet. A team cannot pass there. There is no passage for a team there. The street has been opened but never been worked through on the south side of the railroad. Holland Street is in the same situation. It has never been worked, though opened. In its present situation a team could not pass it if it were worked. The embankment is about 3 feet high, may be more. The present street is two feet below the grade fixed; if filled to its proper grade, it would be about a foot below the railroad. In French Street there are two bents standing in the street, and 16 feet apart, nine and one-half feet high from the mud sill to the bottom of the stringers. I think it an obstruction; a ton of hay could not pass under the bridge. Two loads of hay could not pass; two loads of wood, by driving pretty close, might pass each other, but it would require careful driving. In addition to the two bents spoken of, there are two bents which I think are in the street, one on each side near the line of lots but in the jurisdiction of the side walk.

Q. What effect towards obstructing the street do these bents and stringers have as now placed?

A. The bents being in the centre of the street and the stringers too low, a load of hay cannot pass, and I consider it an obstruction to the free use of the street; it would be difficult for 2 teams, were they to meet to pass; small teams might pass but a load of hay could not. French Street is a leading street from the country to the city and much used. The railroad crosses State Street by a bridge. State Street is 100 feet wide. Four bents of the bridge come on the street.

Q. State as to whether the bents obstruct State Street.

A. I should not say they did. The street between the bents is planked, and on each side of the bents is a ditch or gutter with water. It has never been worked and filled up further than the bents.

Q. Would the bents obstruct State Street if improved to its full width?

A. They would.

The railroad crosses Turnpike Street pretty nigh at grade. I

cannot say how many tracks. There are several tracks for switching off laid on this street.

Q. State as to whether Turnpike Street is obstructed by the railroad.

A. It is difficult sometimes for people to get along there. There horses take fright, and that they have trouble in that way. There are several tracks on Peach Street.

Q. State as to whether Peach Street is obstructed by the railroad and its use.

A. It is obstructed of course, but it is well planked. It is as good a crossing as it could conveniently be with the rails laid down. The cars are, of course, an obstruction. I have known of people being detained there and could not pass. I have had to go there several times to see to it. Peach Street and Turnpike Street are generally travelled streets. They are among the principal travelled streets into town. I don't know that there is any other streets more travelled than Peach and Turnpike Streets.

Cross-examined by Respondents.

I am not an engineer, nor have I paid attention to that business. I think that the railroad crosses all the streets but Turnpike Street at right angles. I cannot say when Ash Lane was turnpiked and opened. It was opened before my time. I do not think it is much travelled to get to the city. It is open through from Buffalo Street to Sixth Street. It has not been worked for the use of teams. I do not know that that lane could be crossed by the railroad to be a less obstruction than it now is. The Erie and Wattsburgh plank-road is laid on Parade Street.

Q. Could Parade Street be crossed by the railroad and be a less obstruction than it now is?

A. I think not.

Q. State whether German Street, where the railroad crosses, has been opened and worked for travel by teams.

A. It has not been made passable for teams.

Q. If opened and worked would it not afford as good a passage for teams as Parade Street?

A. I think not.

Q. State why.

A. Because I think that the street would not require filling up enough to bring it on a level with the present track.

Q. How near would it come to the grade of the railroad if filled up?

A. I think it would if filled, lack about one foot of being as high as the foundation of the railroad. The railroad crossed here at a low wet place. I would make the same statements as to the opening, width, situation, and grade of Holland Street, as I have of German Street, also as to the travel upon it. I did not know the grade of French Street when the railroad was located.

Q. State whether the same grade of land that there is Holland Street and German Street does not extend to French Street.

A. The land rises from Holland to French Street, and then falls very suddenly.

Q. When was the present grade of French Street established, and when was the street opened to that grade?

A. Last summer was a year that we first worked in filling and levelling. Mr. Low gave me, last summer, directions as cutting and filling on that street, as there was some of each to be done. The street had been opened for some years before. Last summer Mr. Low surveyed and fixed the stakes on that street.

Q. State whether State Street at that point of crossing was ever opened, worked, and travelled by teams until the Erie and Waterford Plank Road was constructed.

A. Not to my knowledge. That point has been and is now in part the bed of Mill Creek. The embankment of the plank road there is about 4 feet high, built on the bed of the creek. It was built by the Plank Road Company. No other part of the street there is occupied, nor could it be without filling, except that part used by the Plank Road Company.

Q. Could Turnpike Street or Peach Street be crossed by the railroad at that point and be a less obstruction than it now is?

A. I don't know that they could.

Re-examined by Complainants.

Q. Would it not be possible to pass them with less obstruction if there were not so many tracks used for switching off and on the cars and making up trains?

A. I think it would. The depot is on the west side of Peach Street.

Q. If the railroad, instead of crossing Parade Street where it now does, had been so located as to have crossed it north of Sixth Street, would it obstruct the travel into the city as much as it now does?

A. I think it would not.

Cross-examination resumed.

Q. To cross Parade Street north of Sixth Street, would it not be necessary to cross every street from 12th to 6th, inclusive, diagonally?

A. Why yes. I don't see how they could come within the bounds of the city without it.

Re-examination resumed.

Q. State whether any of said streets from 12th to 6th are used as streets leading from the country to the city.

A. I think there are none so used east of Parade except 10th; some of them are a little fixed up to get to stone quarries, &c. Sixth

Street is opened, and east of Parade Street is very much travelled. It leads to a thickly settled country. Tenth Street does not go beyond the town plot.

JOSEPH DEEMER.

Sworn and subscribed before us, April 13th, 1854,

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Samuel H. Metcalf was recalled by complainants, and testified as follows:—

Q. State if you are acquainted with crossing of the railroad over Peach and Turnpike Sts., the number of tracks upon the same, and the manner in which they are crossed and used.

A. I am acquainted with them. There are three tracks crossing those streets at that point. There is a switch on each side of the street. There is a locomotive that is playing backwards and forward on the street nearly all the time, very frequently, in making up and discharging trains. I counted the number of times the locomotive crossed those streets 2 days. The first day (March 23d, 1854) it crossed one hundred and twenty-eight times (128), between 8 o'clock in the morning and 6 in the evening, 10 hours. There were thirty-nine trains passed over. I called a train a locomotive with three cars attached. Less than that I did not call a train. The next day (March 24, 1854), between the hours of 6 in the morning and 5 in the evening, eleven hours, the locomotive crossed 147 times, and 44 of those times with trains. In those two days the locomotive, in addition to the number mentioned, came on to the street 22 times, but did not cross—coming on and backing off obstructing teams. The street was twice each day blocked up by cars, from four to five minutes each time.

Q. State whether at any of the times of the locomotives and cars passing on those days, travellers with teams could have passed over the streets into town.

A. Of course they could not while the trains were passing or the locomotive. I should think the days spoken of fair average instances of the going of the locomotives and cars, so far as my observation has extended. I consider Peach and Turnpike Streets the principal travelled streets in coming into town, at least more than any other street. The teams have to stop whenever the locomotive is coming. There is a flagman who signals, and he is kept busy all day. I was employed as freight agent from April, 1852, to October, 1852. For the next year, that is from October, 1852, to October, 1853, I had a contract from the Railroad Company to transport the freight. You might call me agent, but I was not an employee of the road with the rest, my duties were separate.

Q. State now your observation of the effects of the passage of the

cars over those streets upon persons coming into town, and going out upon those streets during that time.

A. I have seen the street blocked up several times so that travellers could not get by without going under or over the cars. They (the cars) do interrupt travel very materially. I have seen (more than once, the street blocked up for more than a quarter of an hour. In fact, we could not do any other way. The trains were so long that they reached from the freight house to the street, and across it. It was when we were making up and starting trains. We frequently had trains stand over the street while we were making them up. It was a frequent occurrence during that time.

Q. Does the frequent passage of the trains and cars over those streets occasion delay of travellers going out and coming into town?

A. It does.

Q. Is the use and occupancy of these streets by the company, as you have observed it, an obstruction to the free use by the public of those streets as a highway, and whether it is great or small?

A. I consider it a great and dangerous obstruction.

Q. Do you know Penn Street? and state where its location is.

A. I do. It is located between Sassafras and Peach Streets.

Q. How is it occupied by the railroad?

A. There are two tracks the whole length or nearly so, the one laid down last winter, and two trains standing upon those tracks nearly all the time. In addition to that there is a house built on that street, which, I suppose, contains locomotives, though I don't know. There is also a platform built, one end of which, I think, is in the street. I never measured it, but I have sighted along the tank house, and think that one end of it is in the street.

Q. Considering the street as you have described it, can it be used as a common highway or not?

A. I don't think it could very well. I saw a horse and buggy on the street, and the only way they could get along was to go on the sidewalk till they got on Peach Street. This was the only vehicle I saw (during those two days) travelling the street.

Q. Does the occupancy of the street, as you have observed it, obstruct the free use of it as a public highway?

A. Of course it does; because it can scarcely be travelled at all. I am acquainted with the manner in which the railroad crosses French Street. It crosses by means of a bridge. There are two bents near the middle of the street on which the bridge rests. I believe the street is sixty feet wide. It is somewhat travelled now, though I don't think it one of the principal streets leading into the city. I should the bents and the height of the bridge a serious obstruction to the use of French Street as a public highway. I would not like to go under there with a load of hay, for it would strike, nor with a high top carriage, or large load of wood.

Cross-examined by Respondents.

I think Penn Street was laid out since the town plot, by the owners of out lots. Before the location and construction of the railroad, Penn Street was from three to eight feet higher than it is now. I never measured it, but should judge so from the slope. I think, though I don't know, that the Erie and Northeast Railroad graded the street, I have seen men at work on it; I saw Mr. McManus at work. I don't know that he was employed by the railroad, but I thought he was. I thought McManus his name.

Q. Was Penn Street an open, graded, and travelled street, before the location of the Erie and Northeast Railroad?

A. I don't know as I was here when the railroad was opened, and I cannot say whether it was opened or not. If the rails were away from that street, it is now open, and has been so that teams could get along from Peach to Sassafras Streets; teams have passed through frequently, before that second track was down. It is a cross street, not a leading street coming into the city. I think it does not extend farther east than Peach, nor does it west of Sassafras, because there is a house right there against it.

Q. Does not the railroad cross Turnpike and Peach Streets at grade?

A. It crosses at the grade of the streets, as near as you can make it.

Q. Could the railroad cross those streets, and be a less obstruction than it now is?

A. It could, by reducing the number of tracks, and removing those switches from where they are.

Q. Are not those additional tracks and switches necessary in making up and discharging trains, and would not the necessity of them be dispensed with by a through track and gauge?

A. It is necessary to have tracks and switches in making up and discharging trains. I think that those switches might be put some place else, where they would be less obstruction. The tracks are necessary. If the switches were removed it would be a good deal less obstruction. If there was a through gauge, I don't think there would be any necessity of making up trains at all at Erie. I was not employed to go to the railroad, to count or observe the number of trains, &c. In March last I went of my own free will, it was at the suggestion of J. B. Smyth, one of the City Council. At the expiration of my contract in October, 1853, I made application to the company to have it continued for another year, at least I handed them a proposition. The contract has not been continued. There was no absolute refusal that I know of. At the expiration of the contract, I instituted two suits against the Railroad Company, and they are now pending.

Q. I wish you to state whether you did not assist in tearing down

the bridges of the Erie and Northeast Railroad last winter, and tearing up the track.

This question was objected to by the complainants on the ground that it is unconnected with the subject matter in the direct examination.

¼1 P. M. Examiners adjourned until 2 P. M.

April 13, 2 P. M. Examiners met, and Mr. Metcalf being again on the stand, and choosing to answer said: I was present when the bridges were taken down. I was sworn in a policeman and was there in that capacity. The first time that the bridges were taken down I did not assist. The second time I pulled on a rope I think twice.

Re-examined by Complainants.

Q. You state in answer to Mr. Walker's question, that if there was a through track it might dispense with the necessity of the switches and tracks across Turnpike and Peach Streets; what did you mean by a through track, and from what point to where, was your answer based upon?

A. I mean if there was a track through the entire city, without stopping.

Q. Have not the Erie and Northeast Railroad a through track from one end of the road to the other?

A. They have.

SAMUEL H. METCALF.

Sworn and subscribed before us, April 13, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Joseph P. Grant, produced by complainants, was sworn, and testified as follows: I am sixty-one years of age; I reside in Erie City, and my occupation, till recently, a farmer. I know where the Erie and Northeast Railroad crosses Peach Street and Turnpike Street. I think there are three tracks. In my judgment they are the principal streets leading into the city of Erie. For thirty years back I have been acquainted with them. I can speak as to the number of times the cars cross those streets. I was called upon to go up, on the 28th of March last, to see how many times the cars went across Peach and Turnpike Streets, in the course of a day. I commenced at the making up of the 7 o'clock train in the morning, and continued until the departure of the 7 o'clock in the evening of the same day. I counted, and the locomotive went on so as to block the streets 160 times on that day. 70 times the cars were attached to the locomotive. Of these instances of the trains and locomotives being on the streets, they did not go on to Turnpike Street, but they did on to Peach Street in each instance, and on to Turnpike Street in most instances. Several times the locomotive ran down from the west,

and crossed the switch in front of Session's, which I made no count of. On Tuesday, the 29th of March, I commenced, and remained the same length of time that I did the day before. The number of times of the locomotive passing that day was 146, and 71 of these times cars were attached; and as on the day before, the locomotive came down a number of times and switched across in front of Session's, and went back. These cases I did not enumerate.

Q. What effect had that on travel coming in and going out of town on those streets?

A. It stops the travel while they were on the streets. There was a flagman there, and he was kept pretty busy.

Q. From your knowledge of that locality, and from what you saw there, and your knowledge before and since, is the railroad, as used, an obstruction to the free use of those streets as public highways?

A. I think those streets are affected materially, or the people are, by the railroad and cars being on those streets. I think them a very material obstruction. I think it endangers the travel crossing the streets. I never saw any accidents.

Cross-examined by Respondents.

Turnpike Street and Peach Street come together where the railroad crosses, but it makes a wide place. The railroad crosses both these streets at grade, or as near as it can be.

Q. Could the railroad cross those streets so as to be a less obstruction than it now is?

A. To have the depot where it is, I don't know as it could. I think it a bad place to have a depot, it would be better if it was farther west or back. I don't know as the irons could be laid on the streets so as to be less obstruction than they now are. I was employed or spoken to by the firm of Thompson & Grant, Lawyers, in Erie. Mr. Grant spoke to me to make examination of crossing. I cannot say how many through trains passed. I did not take notice particularly of that.

Q. You state that you consider the railroad very materially obstructs the streets, and very materially endangers travel there; I wish you to state in what that danger and obstruction consists?

A. If a man is crossing with a team, and the cars hit him, it will stave him to pieces. If there was not any danger the people would not stop and wait until the cars had passed.

Q. Had not the company on those days, 28th and 29th March, a man there to give notice with a flag to all persons when the cars were approaching?

A. They had. I stated it in my examination in chief.

J. P. GRANT.

Sworn and subscribed before us, April 13, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

John E. Nicholson, produced by complainants, was sworn, and testified as follows: I reside in Millcreek township, about two and a half miles from the Erie City line, am a farmer, and 57 years of age. I have frequent occasion to come to Erie with a team, sometimes once a week, sometimes oftener. In coming into the city I almost always come in on Peach Street. It is very seldom that I go on another street. In coming into town I have to cross the railroad to transact my business. I am acquainted with the manner in which the railroad crosses the streets (Peach and Turnpike).

Q. State whether the manner in which the railroad tracks cross Peach and Turnpike Streets and their use obstructs the free use of those streets as public highways.

A. I should think they did. They have their switches and tracks laid down there, as if it was part of their depot. I should think it quite an obstruction. I never saw any serious accidents there. I have seen two teams runs off, and some narrow escapes.

Q. State whether or no the travel is delayed there by the use of the road.

A. They have a flagman there, and as quick as the locomotive or cars rings a bell, he stops the teams from passing the railroad. Sometimes a dozen teams will be delayed there and crowded together. The horses become restless and back up, and run against each other.

Cross-examined by Respondents.

Q. In what does the obstruction consist in the railroad crossing over Peach and Turnpike Streets?

A. It consists in the cars passing and repassing there, frightening teams, and stopping them.

JOHN E. NICHOLSON.

Sworn and subscribed before us, April 13, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Wm. Miner, produced by complainants, was sworn and testified as follows: I reside in Milcreek township, Erie County, am a farmer, and 71 years of age. I reside 4 miles from Erie, southeastwardly. I have resided there 37 years. I have frequent occasion, generally as often as once or twice a week, to come into Erie with a team. In coming into Erie to transact my business, which is generally north of the track, I have to cross the Erie and Northeast Railroad. I am acquainted with the place where the railroad crosses Peach and Turnpike Streets. I have seen them switching, but never counted the switches.

Q. State whether the railroad tracks and switches on those streets are an obstruction to their free use as public highways?

A. I think they are. I should consider them a great obstruction.

Q. State your reasons why you so consider them.

A. In frightening teams and detaining of them. I consider that the principal one. The railroad track without the cars would not be much of an obstruction. I should think it dangerous for some teams; that is, they may get frightened. I never saw any person hurt. The railroad crosses French Street about at a right angle with the street, on a bridge. The bents rest upon the street, but it is wide enough for a team to pass betwixt the bents. It was some time since I passed under there; there was a mudhole there under the bridge. This was before it was torn down. The bridge was not high enough for loads of hay to pass under it, I should think.

WM. MINER.

Sworn and subscribed before us, April 13th, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Samuel M. Brown, produced by complainants, was sworn and testified as follows: I reside in Millcreek township, Erie County, a farmer, and 47 years of age. I reside about 4 miles from Erie, southwestwardly. I frequently have occasion to come to Erie with a team on business. In coming into Erie I have to cross the track of the Erie and Northeast Railroad. I cross it on Peach and Turnpike Streets. I believe I am reasonably acquainted with the manner in which the railroad, its tracks and switches, cross these streets near the depot.

Q. State whether the manner in which the Erie and Northeast Railroad occupies and uses those streets, does or does not obstruct their free use as public highways.

A. I think it does. I should consider it a great obstruction. I should think it rendered the passage of teams across the streets dangerous. It is because the cars switching across the streets scare our animals and detain us in our course of business.

Cross-examined by Respondents.

Q. You have stated in your examination in chief that you consider the crossing of the streets by the railroad a great obstruction, and the passing of those streets dangerous; state fully in what that danger and obstruction consists.

A. It consists in the cars passing through and frightening our animals, exposing and endangering us in passing, also detaining us in our time.

SAMUEL M. BROWN.

Sworn and subscribed before us, April 13, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

William Dunn, produced by complainants, was sworn and testified as follows: I reside in Summit township, Erie County, a farmer, 56 years of age, and five miles south of Erie. I have frequently to come into Erie on business with a team, from one to two times a week generally. I have generally to cross the railroad, our usual place of coming in being on Peach Street. I am acquainted with the manner in which the railroad crosses Peach Street and Turnpike Street. I know they have several *rails* there and switches, but I never counted them. I know that they frequently switch back and forward there.

Q. State whether the manner in which the railroad crosses and occupies those streets is or is not an obstruction to their free use as public highways.

A. I think it is an obstruction. I think it is a great obstruction.

Q. What do you say as to its being dangerous?

A. I consider it dangerous.

Q. State in what the danger and obstruction consists.

A. The running of the cars is one cause of the danger and obstruction. The switching more particularly, in making up trains, as I suppose. In coming into town we frequently come almost on to the cars before we can see them, because Session's building obstructs the view on the west, and another building on the east. I have had a trial of this myself, in coming in with a team, three or four times. I allude to these times in particular. A year ago last winter I came near being caught between two locomotives, the one coming east and the other west. I was almost on the track, and somebody called to me to stop, but I was so far that I went on and barely got through. I thought, however, that the locomotive tenders tried to stop them. There was no person there to give the alarm that I saw; did not see the person that called to me to stop. I called it an escape. If my horses or one had slipped and fallen, I would have been run over and smashed to pieces. Last Monday I was coming in, and crossing the railroad, my team came very near running away, being frightened by a locomotive coming from behind Session's. Something similar occurred last evening, as I was going out of town.

Cross-examined by Respondents.

Generally speaking, I think the railroad crosses about grade, though it needs some repair.

Q. Could the railroad cross those streets at that point, and be a less obstruction than it now is?

A. I don't know that it would.

Re-examined by Complainants.

If the street was not used for switching there would be much less obstruction than there is now.

WILLIAM DUNN.

Sworn and subscribed before us, April 13, 1854.

JAMES SILL,
GEO. H. CUTLER,
Examiners.

William H. May, produced on the part of the complainants, was sworn, and testified as follows: I am 34 years of age, an innkeeper, and reside in Millcreek Township, 2½ miles from Erie. I am in the habit of coming to town frequently with teams; I usually come in on State Street, on the Erie and Waterford plank road. I know where the railroad crosses and occupies Peach and Turnpike Streets.

Q. State whether the manner in which the railroad occupies those streets is an obstruction to their free use as public highways.

A. It is an obstruction; I should call it such to a great extent, because of the running of the cars and switching off locomotives and cars.

Q. Why is the running of cars, and switching down there, an obstruction?

A. It prevents teams from passing, detains and frightens them. I have never seen any accidents there, though I have heard of them.

Q. Did you meet with any accident yourself, owing to the railroad at State Street? If so, state what it was.

A. I had my leg broke there, by a span of horses frightened by a locomotive standing on the bridge a little west of State Street, towards the mill. This locomotive was headed to the east. I think that it had run down, and was letting off steam to back up; the steam frightened the horses. This was ten or twelve rods from the depot, I should think.

Cross-examined by Respondents.

This accident was on the 9th of March, 1853. I have brought suit on account of this, which is now pending in Erie County.

Q. Could the railroad cross Peach and Turnpike Streets at that place, and be less an obstruction than it now is?

A. I think not.

Re-examined.

Q. State whether the mere crossing of the streets by the railroad, without using it for switching back and forward, and making up trains, would be as great an obstruction as it now is?

A. It would not.

Cross-examination resumed.

Q. State whether the obstruction, then, does not consist in its use.

A. It does.

WILLIAM H. MAY.

Sworn and subscribed before us, April 13th, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At half-past 5, examiners adjourned to April 14th, at 9 o'clock, A. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

April 14, 9 A. M. Examiners met, and Samuel Low, being recalled by complainants, testified as follows: I am acquainted with the Erie and Northeast Railroad. At present, it connects at the New York State Line with the Buffalo and State Line Road.

Q. How far south of the limits of the Borough of Erie, as it existed in 1842, and up to 1848, the railroad of the Northeast and Erie Railroad Company strikes the City of Erie?

A. The centre of the Erie and Northeast Railroad is fifty-nine and three-quarters rods south of the borough limits, or line as it was in 1842, and up to 1848. The railroad continues along through the southern part of the city, nearly on the line of lots, in a western direction, to Peach Street. There it diverges more westwardly, and continues on to Sassafras Street. It meets there what is called the Franklin Canal Railroad. That road (Franklin) passes out of the city, I think, south about 70 degrees west, clear through the southern and western portions of the city; it leads to Cleveland. The business portion of the City of Erie lies north of these two railroads, and between them and the lake, which is the principal place of business. Trade coming in from the southern portions of the country has to cross these roads, in coming in to the central part of the city. I am city surveyor. The railroad crosses Ash Lane at about grade. This is the eastern boundary of the city. No grade has been fixed to Ash Lane, but as I judge I should think it about grade. The railroad crosses on line of out-lots, from Ash Lane to Parade Street, eighty rods. It crosses Parade about two feet above the street as it is; but I think not more than one foot above the accurate grade of the street. It would not be difficult to grade the street to a level with the railroad. Parade is one of the mainly travelled streets to the east part of the county. The Erie and Wattsburgh Plank Road is laid on this street. It runs 40 rods on the line of the lots, from Parade to German Streets; Parade Street is 100 feet wide; German Street is 60 feet wide; it crosses German Street, I think, 2 feet above the grade of the street, as it should be laid. German Street is fenced out, but not improved, from that south and a little north. It is wet and muddy, and swampy half way south to Buffalo Street. This wet ground is for a distance of about 40 rods south. Buffalo Street, about 60 rods south, is the southern boundary of the city, under the act of 1848. Buffalo Street is the main thoroughfare from east to west, for those who do not wish to come into the city. From German to Holland Street, the railroad runs on the line of lots 40 rods to Holland St.; it crosses Holland, the top of the rail about a foot above what I think would be the grade of the street,

if the railroad was not there. Still the street might be accommodated to the grade of the road. Holland Street is partially opened and used, between Buffalo Street and the railroad, and was so before the construction of the railroad. The last time I was there, say two or three weeks since, there were no facilities for crossing that street that I recollect. From Holland to French Street, 40 rods, the railroad crosses on the line of lots; it crosses French Street on a bridge; from the bottom the stringers to the present grade of the road is about 10 feet; to the rock, I used to call it 11 feet from the bottom to the stringers; it was graded out to the rock by the company to put in their timbers; the city fixed the grade afterwards; the width of the street is 60 feet; there are two bents standing in the street; but as there are three sets of stringers, four bents must be used, but I think the outside bents are near the line of the street. The bents are about 19 feet apart. I think that there are no braces between the centre bents and the stringers; over this nineteen feet, the bridge is ten feet high; but over the rest of the street the earth is higher. I would not say that the space between the bents is 19 feet. I did not measure it, but I had such an impression. On the other portions of the street I should think it about 8 feet from the earth to the bridge. The earth has been excavated on that portion down to the grade. Previously to the construction of the railroad, French Street was opened and used as a street. At present the grade of the street has been established lower, on account of the bridge being there. Probably if the bridge were not there, there would be a summit on the street there, but I think the present grade a good one.

Q. State whether the grading down to the rock would be a proper and convenient grade.

A. It was our intention to grade that street down to the rock. We found it would be muddy, that the rock would not remain such, but become muddy, and we fixed the grade a foot higher. From French to State Street the railroad was through a 5 acre lot (20) rods to State Street, which is 100 feet wide. It crosses State Street on a bridge. I think that there are 5 bents in the street, through these may not be but 4 bents in the street. The bents are nineteen feet apart. It goes on to Turnpike Street through the centre of a five acre lot. To Turnpike Street is a little short of 300 feet, about 260 feet, in crossing Turnpike Street and Peach street, it runs about 120 feet, crossing those streets at their junction, to the west line of Peach Street. The railroad crosses those streets at grade. There are I think 3 tracks, perhaps a part of the way 4 tracks, across those streets. Peach and Turnpike Street are about 15 feet higher than State Street. Penn Street is on the line of lots running from Peach to Sassafras. The centre of the railroad is the centre of Penn Street on the west line of Peach Street. There are two tracks partly through Penn Street; the eastern end of Penn Street there are 3 tracks, 2 of them do not go far on that street, but soon diverge on

to the depot lot. I think these 2 do not run farther than 40 feet. I do not know of any buildings being upon the street.

Q. Is there not buildings north of the New England House and nearly opposite the back buildings of that house?

A. I know of none. I think that there is one house facing the street between Peach and Sassafras Street, in addition to the back buildings of the New England House. The railroad tank house, wood house and engine house are standing about on the line of the street. I gave the corners of the depot lot for the purpose of the company's building their houses. The wood house, tank house, blacksmith shop, &c. of the railroad are on the north side of Penn Street. There is a track south of these houses on Penn Street. The engine house stands near the corner of Penn and Sassafras Street. The track, I think, goes clear along to the engine house. The streets running east and west in the city of Erie, with the exception of Front, Sixth, Tenth and Twelfth Street, are sixty feet wide. Front is an irregular width; Sixth, Tenth and Twelfth are 100 feet wide. The streets running north and south are all 60 feet wide, except Ash Lane, Parade and State Street. Ash Lane, the centre of which is the eastern boundary of the city, is 30 feet wide; Liberty Street, the centre of which is the western boundary, is 100 feet wide. The blocks or squares in the city are 20 by 40 perches, except those between Peach and French; and they are 20 by 20, except those cut by the public square, which are 10 by 10. The water lots extend 800 feet, I think, from north side of Front Street.

Cross-examined by Respondents.

The grade of French Street was established, I think, a year ago last fall. In fixing that grade the intention was to fill up about 6 inches; I think it has been filled about one foot. Holland Street, south of the railroad, was not turnpiked before the railroad was made, nor is it yet, though opened and partially used before the road was located. It was not so opened and graded or made usable before the railroad was located, so that a loaded wagon could pass over it south of the railroad, nor is it so yet. In speaking of Peach and Turnpike Street being 15 feet higher than State Street, I wish to be understood as saying that those Streets are that much higher than State Street, where the plank road goes under the bridge over State Street.

Q. Taking the whole grade of the railroad, as now established through the city, is it not as well accommodated to the streets as it well could be?

A. I think it is.

Re-examined by Complainants.

Q. Does not Peach Street continue higher than State Street for some distance south; and state about how much higher?

A. Peach Street rises from the point we have been speaking of,

from there to Court Street 20 rods, about 8 feet, and Buffalo Street 40 rods, about 5 feet more; from Court to State Street, in the first 20 rods, rises but very little, say one foot, and in the next 40 rods about 12 feet, making 13 feet rise between there and Buffalo Street, leaving the difference in grade on Buffalo Street about the same that it is at the railroad crossing.

Q. Is not Buffalo Street a main travelled street from east to west, and is there any difficulty in getting from Peach to State Street upon it with loaded teams?

A. It is a main thoroughfare for foreign travel. There is no difficulty in passing from State to Peach Street upon it with a load.

SAMUEL LOW.

Sworn and subscribed before us, April 14, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

John Mohr, being called by complainants, was affirmed, and testified as follows: I am a farmer, 41 years of age; I reside in Millcreek township, about 7 miles southwest from Erie. I have frequent occasion to come into Erie on business with a team, averaging, during the year, about once a week. In coming in I cannot get to the business part of the city without crossing the Erie and Northeast Railroad. I usually cross upon Turnpike and Peach Streets. I have tried State Street; Peach and Turnpike are the most convenient if there was no obstructions. I am in a general way acquainted with the manner in which the railroad, with its switches and tracks, crosses Peach and Turnpike Streets.

Q. State whether the manner in which that railroad crosses and occupies those streets is or is not an obstruction to their free use as a public highway?

A. It is; and I regard it as a very serious and a dangerous one.

Q. In what does it consist?

A. It consists in the frequent crossing and re-crossing of the cars and locomotives, and thus detaining persons with teams, and frightening horses, &c., by which life and property is endangered, as I have once experienced, notwithstanding my precaution.

Q. State if you know of any escapes or injuries occurring there on account of the railroad?

A. I do. I myself met with a disaster there some time last summer; going out of Erie, not discovering any obstruction, went almost to the rails. The eastern train was about ready to start, and hidden from my view by the depot house. Immediately after my crossing the track the engine blew the whistle and so frightened my horse that he became instantly unmanageable. I was in a cracky wagon. He ran against the posts of the sidewalk, broke the wagon, cast me, and another man who was with me in the wagon, headlong on to the

sidewalk, *broke loose and ran away.* I was not seriously hurt myself; the other man was considerably bruised.

Q. State whether the danger could have been avoided by going around by State St.

A. Not much; I have tried it. That road is so narrow that if a man does not get by before they have passed (the locomotive frequently playing on the bridge), that the horse will inevitably take fright from the noise and steam, and whirl round and upset. The roadway is so narrow that you cannot turn around; and, being so narrow and the embankment so high, you must upset. I have passed there, but always in terror.

Q. Taking into consideration the narrowness of the plank road at State St., and the height of the embankment, with the liability of fright to horses from the moving back and forward of the locomotives, whether, is the passage on State Street, under the railroad bridge, more or less dangerous than the passage over Peach and Turnpike Streets?

A. I scarcely know—I have tried sometimes the one and then the other, and I cannot say which is the most dangerous—they are both dangerous. I cannot say exactly how wide the embankment of State Street is; it is, however, narrow and high, continuing so for some rods.

JOHN MOHR.

Affirmed and subscribed before us, April 14, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

John K. Caldwell, produced by complainants, was sworn and testified as follows: I am a farmer, 53 years of age, and reside in Millcreek township, about two miles southwest of the depot. I have resided in Millcreek about 40 years. I have frequent occasion to come into town on business with a team. I usually come to town from two to three times a week. My usual way of coming in is by way of Peach and Turnpike Streets. I am very well acquainted with the manner in which the railroad crosses and occupies those streets.

Q. State whether the manner in which the railroad occupies and crosses those streets, is or is not an obstruction to their free use as public highways.

A. I would consider the track itself some obstruction, though not serious, when kept in as good repair as it now is. The use of the road, running of cars and locomotives, I consider as a serious and dangerous obstruction.

Q. State your reasons for considering it a serious and dangerous obstruction.

A. I consider it so on account of scaring our horses, teams that

don't come in more than once or twice a week. From the fact that when the cars are coming in from the east, it is not safe to run across the track when the cars are anywhere near, if you hear them ring their bell. Sometimes a dozen teams will be on both sides of the track waiting for the cars to pass. When the cars come in, teams become restive and scared, so that often some, many of them in fact, become unmanageable. When we then start going both ways meeting, carriages and wagons are liable to come in contact, in consequence, from the horses being frightened and crowded.

Q. State as to whether the danger could be avoided by going around by State Street.

A. I think not, in coming into town particularly. The road being narrow, and raised quite high, horses being scared, there is no room for dodging whatever. If he dodges he is liable to have his carriage upset.

Q. Why are the horses scared in passing under the bridge?

A. From the locomotives running across the bridge.

J. K. CALDWELL.

Sworn and subscribed to before us, April 14, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

John Burton, produced by complainants, was sworn and testified as follows: I am a farmer, 44 years of age, reside in Millcreek township, where I have lived 42 years, about 4 miles from Erie southeast. I have frequent occasion to come to town with a team on business, averaging from two to three times a week. In coming to town on business, I have to cross the Erie and Northeast Railroad. I am acquainted with the manner in which the railroad crosses and occupies Peach and Turnpike Streets.

Q. State whether the manner in which that railroad crosses and occupies those streets, is or is not an obstruction to their free use as public highways.

A. It is a serious obstruction. I consider it dangerous.

Q. State why you consider it a serious and dangerous obstruction.

A. On account of the liability of coming in contact with the cars. The scaring of teams by the locomotive, and by detaining persons in waiting, delaying them in their business.

Q. State whether the danger could be obviated by going round by way of State Street.

A. I think not. My horses seem more frightened with the cars overhead than on a level. I think the danger is more fearful in case of an accident on that road than on the other. The embankment of the road way on State Street is from 5 to 7 feet high for some distance, I should think. The road on the top of the embankment

is narrow. I believe the usual width of the surface of the plank-road is 20 feet, when it was completed, but it does not grow any wider with age. It is not by considerable that width under the bridge. I think it could not be more under the bridge than 15 or 16 feet wide.

Q. State whether you do not reside east of the Waterford Plank-road, and whether your more direct route to town would not be Parade Street.

A. I do not think there is any difference in the distance by the two roads. It usually depends on my business which road I use.

Q. Was not the embankment of the Erie and Waterford plank-road, at the point of crossing the railroad, built by that company, in the bed of Millcreek?

A. I think it was in or near.

JOHN BURTON.

Sworn and subscribed before us, April 14, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 1 P. M., Examiners adjourned until 2 P. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

2 P. M., Examiners met, and

Rudy Shank, being produced by complainants, was sworn and testified as follows: I reside in Millcreek township, am 73 years of age, and until lately a farmer. I reside about a mile from the city, southeastwardly. I am in the habit of coming to town frequently with a carriage or buggy, almost every day, if the weather is pleasant. I am acquainted with the places where the Erie and North-east Railroad crosses the streets in Erie.

Q. Is the manner in which the railroad crosses Peach and Turnpike Streets an obstruction to their free use as a public highway?

A. A good deal of obstruction.

Q. State why it is a good deal of obstruction.

A. Because the cars and locomotives run back and forward most all the time, stopping the people from passing over it back and forward. It is dangerous, because I was in danger myself three or four weeks back. I was coming from the south in my carriage, and a good many teams were stopped there, and when the locomotive went behind the house I thought it was gone, and then I wanted to cross; the flagman ran before and tried to stop me. The locomotive was about a rod and a half off from me. The man reached for my bridle, but I told him not to take hold of it. I got across, but my horse was scared and ran 20 rods before I could stop him.

Q. State whether the manner in which it crosses State street endangers or obstructs the use of State street as a public highway.

A. Yes, very much.

Q. In what does the crossing of State street by the railroad obstruct that street?

A. The cars running over the bridge and standing on it—my horse will not go under it. It is more dangerous than Turnpike and State street.

Q. State whether, in coming to town north of the railroad, it is not as near and convenient to come by Parade street as by Turnpike and Peach streets.

A. It is.

RUDY SHANK.

Sworn and subscribed before us, April 14, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Henry Cadwell, being produced by complainants, was affirmed and testified as follows: I reside in Erie, am a merchant, 40 years of age and upwards. I am generally acquainted with the manner in which the railroad crosses the streets in Erie. I am acquainted with where it crosses Turnpike and Peach streets.

Q. State from the manner in which it crosses Peach and Turnpike streets, is it an obstruction to them as public highways?

A. I should think it was.

Q. State your reasons for thinking that it is an obstruction.

A. The entrance to town there is the most public thoroughfare that comes into the city. From the manner in which the depot is situated, they have to run back and forth over the streets in making up their trains. The effect is, in switching back and forth across those streets, to make up their trains, it must occupy those streets a good part of the time, which prevents persons from coming into the city and going from it. I am acquainted with the location of Penn street. I believe the railroad occupies the entire street. I could not say how many tracks there are on the street.

Q. State whether the trade with this town from the country does not principally come into it, across the line of the Erie and Northeast Railroad and the Western Railroad.

A. It does, the majority of it mostly across the Northeast Railroad.

Q. State whether the principal place of business is not between the Railroad and the Lake.

A. It is, pretty much all. There are one or two public houses south of it.

Q. State whether you know as a dealer, that the difficulty of crossing those roads by people coming in, affects the trade with the town.

A. I believe that it does. I believe that it injures the trade of the town.

Q. If the railroads had been made to the harbor of Erie, would they not have accommodated the trade of the town as well, and have been little or no obstruction to it?

A. I think the railroad coming to the harbor would have accommodated the trade of the town better, and have been little or no obstruction to the travelling public.

Q. About how far south are the depots from the harbor of Erie?

A. I think about a mile and a quarter.

Q. State what effect the distant location of the depot from the harbor has had on the commerce of the Lakes at this point.

A. I think that it has injured it very much.

Q. State what is the difference in the amount of our trade at the harbor of Erie, since the passage through the town of the railroads. State as full as you can.

A. I am not acquainted with the business at the Dock at that time, and at this time, so as to state particularly the difference. There should have been a large increase, but I think the business would be 50 per cent. more, if the depot were at the Dock, at this time.

Cross-examined by Respondents.

I think the railroad crosses Peach and Turnpike streets at grade.

Q. Could the railroad cross those streets at that place, and be less of an obstruction than it now is?

A. I don't know as it could if they switched over their trains in the same manner they now do.

Q. Was you not one of the Directors of the Northeast Railroad when the present line was adopted, and did you not vote for it?

A. I think, though I am not positive, that I left the board before the present line was adopted, though I may have voted for it. I do not recollect that I was present at the meeting of the board when it was adopted. The locality of the road was, I remember, discussed several times before I left the board. I remember that Charles M. Reed, the President of the Company, opposed its location there; that the business of it would be much injured by not locating it at the Dock; that our harbor opening two or three weeks before Dunkirk or Buffalo, it would bring a great acquisition to its business.

Q. State whether the Erie extension Canal does not connect with the southwestern part of the city, and crosses the streets diagonally from south to north, to the harbor of Erie, and whether it is not crossed by the Western Railroad.

A. It does.

Q. State whether the business done by that canal at the harbor of Erie is not greater than it was before the location of the railroad.

A. I cannot say.

Q. You state that you think the business at the dock would be increased 50 per cent. by the location of the depot at the harbor.

State from whence that business would have come, and where destined to, upon the Erie and Northeast Railroad?

A. I will state with regard to the former question; my opinion is, that if the present locality were at the dock, the increase would come from a large amount at this season of the year, coming from New York, Boston, and other eastern cities. For four weeks past, this port being opened while the other ports were closed, a large amount of goods would have been shipped from this port west. My belief is also, that there would have been a large amount of down freight arrived at the dock from the west to be shipped to the eastern cities.

Q. State whether, in your answer to the foregoing question, you do not wish to be confined to that portion of the year in which the harbor is opened here in advance of the eastern harbors on Lake Erie.

A. It alters our position very much from the break of gauge below us. By this break of gauge between us and market, it operates very much to induce shippers to ship to ports below us when they are open.

Q. State whether all the business could not be accommodated as well by leaving the up town depot where it is, and continuing the road from some point on the same to the harbor at Erie.

A. I believe that it could, the business of the lake.

Q. State whether the harbor at Erie is open to-day, and whether the harbor and lake from Erie west has been open for navigation for the last week.

A. I have taken a view of the lake a number of times this week, also this morning; my opinion is, that it is entirely free from here west.

Q. State whether your mercantile business is not better now than it was before the location of the railroad.

A. I don't think it is.

Q. Is it not as good?

A. We may sell as much, but trade is not as good. We don't make as much.

Re-examined by Complainants.

Q. State whether previous to the location of the railroad there were not several lines of steamboats coming here, or touching here.

A. There were, coming here or touching here.

Q. How has it been in regard to that since both railroads have been in operation?

A. I don't know whether there are any regular lines. They stop here frequently to coal.

Q. You have been asked as to the canal coming into town, and to the harbor. State whether it does not go through a deep ravine, which, if passed at all before the construction of the canal, was by means of bridges.

A. It does; that is, in the north part, from Eighth Street to the Lake, bridges would clear the canal a good deal.

Q. Did not the completion of the New York and Erie Railroad to Dunkirk, and the establishment of a daily line from that point west, interfere with the lines previously touching at Erie, and injure the business previously done at our harbor?

A. I think that it did.

Re-examination resumed.

Q. Would the completion of the railroad to Dunkirk harbor have been injurious to us if we had had a railroad to and from our harbor, to have competed thereby for the trade of the lakes?

A. It would not have been if the six-foot track had been completed from Dunkirk to our harbor; it would have benefited our trade very much.

Cross-examination renewed.

Q. Would trade or merchandise destined for the west, reaching the lake at Dunkirk, in the season of navigation, take the lake there, or continue on the railroad to the harbor of Erie, to be shipped there?

A. With the present road no doubt most of it would be shipped from Dunkirk.

Q. Would it not with any road, and of any gauge, be shipped from Dunkirk in the season of navigation?

A. A portion of it would undoubtedly; it would depend a good deal upon who owned the railroad; under the first arrangement with the New York and Erie Company, the principal part of it, in my opinion, would have to come here; this is my opinion.

Q. If shipped from Dunkirk to Erie by railroad, would it not increase the costs of transportation to the merchant, equal to the costs of transportation from Dunkirk to Erie?

A. I don't think that it would in that proportion.

Q. In what proportion then would it?

A. If the road had been built to the State line of Pennsylvania, and the Northeast Railroad leased to the New York and Erie Railroad, under the former arrangement, the cost of shipment from New York *via* Erie Harbor to any port west would not have been increased over the present rates, *via* Dunkirk.

Q. How would it be with the roads as they now are, and have been since the location and construction of the Erie and Northeast Railroad, with its continuation to the harbor?

A. The price would be increased, I think, equal to the railroad charge from Dunkirk, or nearly so.

Re-examination by Complainants.

Q. How much longer is the harbor at Erie open in the spring, and safer in fall, than at Dunkirk or Buffalo?

A. It varies from 2 to 6 weeks in the spring, and I consider Erie Harbor safer at times, but particularly in the fall, from the middle of September to the close of navigation.

Q. If the railroad came here to the harbor, would not the trade come here, while the others remained closed in the spring? And would not a great portion of the trade late in the fall come to this point rather than take the risk of the harbor at Dunkirk and Buffalo?

A. Trade in the spring, while the ports are closed below, would undoubtedly come here, east and west. I think our harbor would get considerable trade in the fall, particularly if the gauge was the same.

Cross-examination renewed.

Q. State whether you ever knew the harbor at Erie to have been opened here six weeks earlier than at Dunkirk. If so, state it.

A. The year the Madison came out, the harbor was opened here, I should think, more than six weeks earlier than it was at Dunkirk point; also in the year 1835 (the year I came here), it was opened six weeks, I should think, earlier than it was at Buffalo.

H. CADWELL.

Affirmed and subscribed before us, April 14th, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Wm. Beatty being produced by complainants, was affirmed, and testified as follows: I reside in Erie, am 52 years of age, and until recently a manufacturer of tin and copper. I am acquainted with the crossings of the Erie and Northeast Railroad over the streets in Erie.

Q. From the manner in which the railroad crosses Peach and Turnpike Streets in the City of Erie, is it an obstruction to the use of these streets as public highways? If so, state why.

A. I have never crossed them myself in a wagon, but have been there, and seen people very much annoyed by the locomotive passing back and forward every few minutes. I would consider it a very great annoyance to the travel of the street to those that pass it, in detention, and risk to a person's life. I have never had any experience myself in passing on State Street, but I have heard my family and some ladies in my neighborhood speaking of it as annoying. At French Street, I don't think a wagon with a load on, of hay or such like, could pass that bridge at all; these streets, except French Street, are the most common thoroughfares in coming into town; a good many come in on Parade Street; French can hardly be called such. The passage way under the bridge on French Street is only 8 feet and 4 inches high from the mud-sill to the lower edge of the bridge. I think that a majority of the trade comes in across those

roads, at least it used to be so; there may be difficulty in getting across there too.

Cross-examined by Respondent.

I measured the height of the bridge above French Street to-day; I measured it with Mr. Dillon; measuring from the top of the mud-sill to the bottom of the stringers.

WM. BEATTY.

Sworn and subscribed before us, April 14, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Five and a half P. M., April 14th, adjourned to April 15th, at 9 A. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

April 15th. Examiners met at 9 A. M.

J. M. Reed, produced by the complainants, was sworn, and testified as follows: I reside in Millcreek, am a farmer, 47 years of age; I reside about four miles south of Erie. I have frequent occasion to come into Erie with a team or buggy: twice a week at least; Peach Street and Turnpike Street are my usual route to town; I have to cross the railroad in coming into town.

Q. State whether you have observed the manner in which the railroad company cross and occupy Peach and Turnpike Streets, and if so, does it obstruct their free use as public highways?

A. The railroad crosses the streets with three tracks; I consider it obstructs the Streets.

Q. State your reasons, and in what it obstructs the streets.

A. It obstructs the streets in the cars crossing the streets and preventing teams from coming into the city while the cars are crossing. I have frequently seen teams delayed a considerable time.

Q. State whether, from the location of the crossing, you consider it dangerous or not.

A. I do; I consider it very dangerous crossing into town: more dangerous than going out; going out we have a very good sight as to whether the engine is in motion, but coming in, we cannot see until we are right on the road.

Q. State what effect the crossing by the bridge has on the travel on State Street, and whether, in your opinion, it interrupts it there or not.

A. It does not interrupt the travel, but it is a very bad place to frighten horses. There is no impediment to travel, but it is a very bad place to frighten horses. The railroad crosses French Street

by a bridge; I seldom go out that street; I never went through there with a loaded team since the bridge was built (it is not my route), but I think it is narrow; a buggy or carriage could pass; I think it might be difficult for a loaded team to pass; a load of hay, for instance, I think the passage too narrow for it.

Cross-examination by Respondents.

The danger in crossing Peach and Turnpike Streets consists in frightening teams, horses, and cattle; the mere crossing of the rails I do not consider of any danger.

Q. What is the usual height of barndoors into which loads of hay are driven?

A. Twelve feet is the usual height; from 12 to 14; 12 at least.

J. M. REED.

Sworn and subscribed before us, April 15, 1854.

GEO. H. CUTLER,
JAMES. SILL,
Examiners.

April 15th, 10½ A. M., examiners adjourned to Wednesday, April 19th, at 8 P. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

April 19th, 1854, examiners adjourned to Thursday, April 20th, at 2 P. M.

GEORGE H. CUTLER,
JAMES SILL,
Examiners.

April 20th, 2 P. M., examiners met, and adjourned until April 21st, at 1 P. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

April 21st, P. M., examiners met, and adjourned until April 22d, at 9 A. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Saturday, April 22d, examination continued till Monday, 24th inst.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

April 24th, examiners met, and continued until Tuesday, April 25th, at 7 A. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Tuesday, April 25th, examiners met, and continued until 26th.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Wednesday, April 26th, examiners met, and adjourned until 27th, at 9 A. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Thursday, April 27, examiners met, and adjourned until Saturday at 9 A. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Saturday, April 28th, 9 A. M., examiners met, and adjourned until Monday, May 1st, at 9. A. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Monday, May 1st, examiners met. Irvin Camp, produced by the complainants, was sworn, and testified as follows:—

I am a civil engineer, reside in Erie City, and am about 38 years of age. I have acted as civil engineer about 10 or 12 years.

Q. State whether you were an engineer upon the Erie and Northeast Railroad, and whether you were engaged in locating the same.

A. I returned to Erie about the 1st of September, 1849, and found the line of the Erie and Northeast Railroad located. It had been located (compass line) under the supervision of Milton Courtright, Esq., and his assistants. I came at the request of the Erie and Northeast Railroad Company, to transit out the line. While engaged in that, an arrangement was made for me to take charge of the road on construction as chief engineer.

Q. State, if you please, whether you made any survey and report to the board, of a line of road that would avoid occupying the Buffalo Road, as the present location does, and what was done upon the report by the board?

A. After having transited out the line agreed upon, and determined accurately the mode of crossing that road, I reported, but did

not survey a modification of that line that would obviate the objections to the present crossing.

Q. Please describe your proposed modification, and state whether it was practicable.

A. I would premise that I will have to speak from memory of the substance of the contents of my report. I called on Mr. Spencer (the secretary and treasurer of the railroad company), on Saturday last, to furnish me an opportunity of reperusing my report, stating to him that I did not wish, in the testimony that I was to give, to say anything more or anything less now than I said then, in regard to the location. I did not wish any subsequent reflections, or views in regard to it, to influence my testimony in regard to it; that I had made that report originally, with no other view than to place myself right professionally.

(Counsel for respondents object to statements of conversation between witness and Mr. Spencer.)

Mr. Spencer refused this morning to furnish me the report without instructions from the board. The modifications I proposed, as near as I can now recollect, was to make a slight modification of the present line from Erie to a point this side of 6 Mile Creek, by throwing it slightly to the south, with a view to bring the line at the east end more on the line of track, and to throw it more out of the swamp. From that point I proposed to make an angle running north of the present location, crossing the 6 Mile Creek north of Twichell's, and continuing on north of Twichell's house to a point northwest of, and in the vicinity of the old Greenwood homestead; thence by a line passing between Greenwood's and Besley's (I mean the Greenwood that resided at that time on the east side of Elliott's Run, on the south side of the Buffalo Road, and in the immediate vicinity of the present Harbor Creek Station), there intersecting the present line of the Erie and Northeast Railroad. I think this line passed south of, and near the present residence of Dr. Sherwin.

Q. State, if you please, how this proposed line would cross and occupy the Buffalo Road?

A. The Buffalo Road near the last point of intersection, makes quite a sharp deflection to the north from the line of railroad as at present, so that the two roads going east from that point depart from each other quite rapidly. The proposed location would have given the shortest practicable crossing of the Buffalo Road that the nature of the case admitted of on this plan—the general direction of the two roads running so nearly parallel to each other. I don't think the line proposed would occupy in crossing more than from 100 to 150 feet.

Q. State, if you please, whether you communicated the proposed line to the board, what your object was in doing so, and whether you communicated that object to the board?

A. I wrote this report, with my reasons for this change, and addressed it to the president of the board. I think I assigned three

reasons for making the report. The first was, that I did not think their 16 mile tangent (their present line) was worth the money which it was costing them for right of way and damages. The second was that when they came to operate, or run their road, the delay incident to so long a crossing run with any regard to their own or the public safety, would more than counterbalance the advantages they expected to derive from their 16 mile tangent. The third reason was that I could not but consider such an occupancy of that public road as an infringement or violation of one of the provisions of their charter, which forbid the occupancy, or crossing of public roads, in such a manner as to impede or obstruct public travel.

Q. State whether you still consider the route recommended by you practicable, and the reasons given for it by you as just and sound.

A. All my subsequent reflections and experience of the workings of the road, have but confirmed my original convictions.

Q. Was there any difficulties in the way of locating the railroad, so as to terminate north of 12th Street, and east of Parade Street?

A. There were no engineering difficulties. There was nothing in the topography of the country.

Q. State whether it was practicable to locate that road so as to bring it to the harbor of Erie, and if so, whether it could not have been done without incommoding the public streets in the City of Erie, as they are now?

A. There were no difficulties except those of cost and grade; if brought to the harbor outside of the borough, it would not have incommoded the streets in the borough, and if brought to the harbor inside of the borough it would only cross the streets at the harbor, or their continuations into the harbor. The witness states that he has no absolute knowledge that his report was before the board, that he mailed it to the President of the board or sent it by one of his assistants, and went east, and has no knowledge that it was ever before the board, except from conversation with some members of the board after his return. The suggestions of the report were not adopted. I am now engaged as contractor in the construction of the Illinois division of the Ohio and Mississippi Railroad, extending from Vincennes to St. Louis.

Cross-examined by Respondents.

The Erie and Northeast Railroad is about 18⅓ miles long. About 16 miles of the road from the depot is a straight line; the first crossing of the Buffalo road is about 6½ miles from the depot; it would be about 9½ miles from that point to the end of the tangent. The railroad crosses the Buffalo Road at the first crossing at and very near grade.

Q. Could the railroad at that point, cross the Buffalo ridge road at that point, in the manner it does, so as to be a less obstruction than it now is?

A. It could not.

Q. From that point east to the Harborcreek station, how often did, or would the railroad cross the Buffalo road, as it was when located?

A. Twice; making in all three crossings.

Q. Was not the location of the Buffalo road, as it then existed, changed at the expense of the company so as to avoid at this point the two last mentioned crossings?

A It was—they brought the right of way for a new road, and graded and bridged it, so as to avoid the two crossings.

Q. Was not that better for the railroad company, and the public road, than the crossing twice?

A. It was.

Q. How many curves would there be in the line of road as contemplated to be amended by you?

A. Three curves in the modification proposed.

Q. Would there not be a curve on the line you recommended near the public crossing, both east and west, to obstruct the view of the cars coming?

A. There would.

Q. Which line of road, the present straight one, or the one you suggested, do you consider preferable, leaving the public road and expense out of the question?

A. Leaving out all considerations of the public road, and the expense, I consider the present one the best.

Q. As the engineer of the company, did you make the best disposition you could at the different road crossings to accommodate the passage of the public?

A. We made the best that was practicable at that time, within the time we had to do it.

Q. Could the crossing at Harborcreek have been made better than it was as the road was located?

A. Not without an entire change of the public road.

Re-examined by Complainants.

Q. Please describe the nature of the curves in the amended line, beginning at Erie.

A. I think I proposed to connect these tangents by what we call half degree curves, that is, with a radius of 11,460 feet, about that radius, and I suggested in my report, in obviation of the objections to curve at the station, that trains did not usually run fast there, so far as the running of the curves were concerned, for practical purposes, it amounted to nothing, except at this proposed crossing, for trains did not stop at the proposed station and running out of time.

Q. When you made the new road did you occupy the old Buffalo road exclusively for the railroad?

A. A good part.

Q. Was there any obstructions at the curve you speak of, to seeing the cars, except the curves themselves?

A. Besley's house might in part, and buildings subsequently erected between Besley's and the railroad, would have obstructed visions across the inside of the curve.

Q. You state that there are no difficulties in coming to the harbor, except the cost and grade; state if you please whether a grade could have been had so as to run to the harbor by a proper divergence east.

A. By diverging three miles east from the present crossing of Mill Creek, a line might have been got with a grade of about 40 feet to the mile, and with a grade of about 53 feet to the mile, with a divergence at a point a little over two miles, that would be with a condition of dropping into such ravines as would give us a continuous grade. The difference being about 110 feet between the elevation at the present depot and at the harbor. If such ravines could not be found, the distance would have to be modified of course.

Q. State if you please whether 40 feet is not a very common and practicable grade on railroads within your knowledge.

A. It is. But any link of the Lake Shore road, I would have recommended a lower grade in going to the harbor for any road running east and west.

Cross-examination resumed.

Q. Would not the ridges you speak of at the Harborcreek Station, bring the curve on the Buffalo road at that point of crossing?

A. It would on the line or set of lines I proposed.

Q. Did you ever survey a line diverging at a point two or three miles east of Erie, with a view of running it to the harbor?

A. I did not.

Q. State whether the banks of Lake Erie are not abrupt within two or three miles east of Erie, and about their height.

A. They are, excepting where creeks put in, and they are about on a level with the town, say 110 feet above the water.

Q. State whether this bank is not a difficult and slippery clay formation, and expensive to make a railroad upon and keep the same in repair.

A. I think it would be.

Q. In view of the difficulties, what grade would you recommend upon the Lake Shore road to reach the harbor, having in view the getting out east and west?

A. I don't think in view of the difficulties I would adopt a greater grade than thirty feet. I would rather encounter the difficulties than adopt a higher grade.

Q. What is the maximum grade of the Erie and Northeast road?

A. I think it does not exceed 18 feet.

Q. How much more can a locomotive draw on a grade of 18 feet than on a grade of 30 feet, and how much more on 18 than on a grade of 53 and 8-10ths?

A. Those are questions that the books give theoretical answers

to. The practical answers I cannot give. The books say that a grade of 20 feet requires about double the power that a level road does.

Direct Examination resumed.

Q. Is not the bank of Lake Erie about of the same formation and height at Cleveland that it is at Erie, and do not the railroads coming in from east and west, southwardly and southwestwardly at Cleveland, terminate at the harbor at that place?

A. It is, and they do.

Cross-examination resumed.

R. Is there not a deep and wide valley running through Cleveland, making it very expensive if not impracticable to run the railroads through the up town of Cleveland, and was it not cheaper for the companies to adopt the roads by the harbor?

A. It would be very expensive but not impracticable to go through the up town, but much cheaper to go to the harbor.

Q. Does that state of facts exist at Erie?

A. It does not.

IRVIN CAMP.

Sworn and subscribed before us, May 1st, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Capt. Daniel Dobbins being produced by complainants, was affirmed, and testified as follows: I reside in Erie City, where I have resided 58 years, and am 78 years of age. Until within a short time I have been accustomed to navigate Lake Erie, since 1804. I would suppose that the difference between the opening of the harbor at Erie earlier than at Buffalo would average for steamboats, about two weeks, and for sail vessels about three weeks. There is no comparison between the facilities of accommodation in the harbor at Erie, and at Buffalo and Dunkirk. The Erie harbor is large enough to hold all the vessels on the lake.

Q. State what is the difference between the trade at the harbor of Erie, now, and as it was before the location of the railroad, at the present depot.

A. I should say that it is at least one-half, judging from the number of vessels that arrive and depart. Owing to the prevalence of western winds in the fall navigation to this place is much safer than to any other harbor east of this. The harbors below are not safe when westerly winds prevails, *but this is at all times.*

Cross-examined by Respondents.

Q. You state that the business at the harbor of Erie is not the

one-half of what it was before the building of the Erie and Northeast Railroad. Is not that owing to some extent to the termination of the New York and Erie Railroad at Dunkirk, and formation of daily lines from that point west by vessels?

A. Yes, I would say, particularly for passengers.

DANIEL DOBBINS.

Affirmed and subscribed before us, May 1, 1854,

GEO. W. CUTLER,
JAMES SILL,
Examiners.

William A. Galbraith, produced by complainants, was sworn, and testified as follows: I reside in Erie. Am an attorney-at-law, and about 30 years of age.

Q. Are you acquainted with Penn Street? if so, state how it is occupied by the tracks of the Erie and Northeast Railroad, if at all.

A. I am. It runs from Peach Street to Sassafras Street, made by the lot holders, and 60 feet wide, part of it is occupied by the Erie and Northeast Railroad. There are from two to three tracks on Penn Street. Some places three, and narrowing at places to two. It extends from Peach about 250 feet west in this manner. From that point there is but a *simple* track west to Sassafras Street.

Q. Is there any buildings of the Erie and Northeast Railroad on the street?

A. There is, if the street is 60 feet wide. The old warehouse, designed by Mr. Camp, was *not* in the street, but an extension of it is in the street if the street is 60 feet wide. I should say that it is about 50 feet from the corner of the platform to the south line of street at the opposite lot. The three tracks are north of the platform, so that nearly the whole space is occupied. About 30 feet are occupied by track at that point, say from 30 to 35 feet. The platform, from the corner of which I stepped the distance, is outside of the warehouse. It is from this about 50 feet to the opposite lot. It is, probably, not over three feet high.

Q. Does the manner in which the street is occupied by the railroad fixtures impede or obstruct the free use of it as a public highway?

A. It obstructs the free use of the street but not entirely, a wagon can get around it. The cars obstruct. Since the change of gauge the old cars of the Erie and Northeast Railroad have stood on the street, towards the north side of the street. There is room for a wagon to get round, and a part of the street can be used by the public.

Q. Do you remember what time the Franklin Canal Company commenced work on their road or their surveys?

(Respondents object to this question as having nothing to do with any allegation in the plaintiff's bill, and the witness proceeded.)

A. The surveys were commenced some time between June and September, 1849. I cannot fix the exact time.

Cross-examination by Respondents.

Q. About how far west of Peach Street is the building which you describe as partly on Penn Street?

A. About 170 feet.

Q. Was Penn Street graded by the city or by the Erie and Northeast Railroad Company?

A. I don't know as I can answer that question. I don't recollect of seeing the city authorities working there. It was not opened until after the construction of the railroad.

Q. Was it a used and travelled street before the location of the Erie and Northeast Railroad at that point?

A. My recollection would be not, although my attention has never been particularly called there until after the construction of the railroad.

Q. Could the rails be laid on Penn Street as they are, and be a less obstruction than they are?

A. I don't know as they could.

WM. A. GALBRAITH.

Sworn and subscribed before us, May 1st, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Examiners adjourned until May 2d, at 2 P. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

May 2d. Examination continued until May 4th, at 1½ P. M.
May 4th. Examination continued until May 5th, at 9 A. M.

JAMES SILL,
GEO. H. CUTLER,
Examiners.

May 5th. Examiners met, and H. G. Sessions being produced on the part of the complainants, was sworn and testified as follows: I reside in Erie City, am about 45 years of age, and a hotel keeper. My house is on the corner of Peach and Penn Streets. The railroad runs right by my door. It is where the railroad crosses Peach and Turnpike Streets.

Q. Is the manner in which the railroad crosses and occupies in crossing Peach and Turnpike Streets an obstruction to the free use of said streets—if so, state to what extent.

A. The railroad in crossing those streets is an obstruction many

times, from the fact that the teams in coming along have frequently to stop and wait until the cars have got across the main travelled road. It occurs many times during the day, that teams in coming along have to stop and wait for the cars to pass. But it is not every time that teams come along that they have to wait. Sometimes the road is clear. I am acquainted with Penn Street. It runs in a west course from my house to Sassafras Street. I don't know exactly where the middle of the street is, but there are a number of buildings that are on the street or very near to it. From Peach Street west on Penn Street there are three railroad tracks until you get about 100 to 150 feet west. There the tracks diverge, and in going west with a wagon you have to cross the railroad track at that point. Between these two tracks going west, there is a wagon way about 30 feet wide. After crossing the tracks where they diverge, the wagon way is south of all the tracks. So far as the free use of Penn Street is concerned, it is much obstructed.

Cross-examined by Respondents.

The railroad crosses at Peach and Turnpike Streets at grade, except the elevation of the rails.

Q. Could the railroad cross Peach and Turnpike Streets in the manner it crosses them, and be a less obstruction than it is?

A. Not if they cross it as much and as often as they now do. The obstruction I consider the running of the cars across the street.

Q. Could the rails be laid on Penn Street so as to be a less obstruction than they now are?

A. As the tracks now lay, I don't know as you could better them—that is, if they are obliged to use that street.

H. G. SESSIONS.

Sworn and subscribed before us, May 5th, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

B. B. Vincent, produced by complainants, was sworn, and testified as follows: "I reside in Erie City, am an iron founder, and about 50 years of age, and have lived in Erie about 11 years. I am acquainted with the location of the Erie and the Northeast Railroad across the streets in the city of Erie. I know where it crosses Peach Street. It crosses near the junction of Peach and Turnpike Streets. The passenger depot is at or near the corner of Peach and Penn Streets. In making up trains on the railroad, especially the freight trains, I think they cross the street frequently. The switch used in making up trains going east is east of Peach Street. Peach and Turnpike Streets constitute the principal avenue of intercourse between the town and the country.

Q. From your knowledge of the manner in which Peach Street

and Turnpike Street are occupied and used by the railroad, is it an obstruction to the free use of them as common highways, and if so, how and to what extent?

A. I consider it an obstruction, a great obstruction, because being one of the chief avenues of intercourse between the town and country, and being crossed frequently by the locomotive, it interferes with, and renders dangerous the free use of the Street. It is rendered dangerous because the locomotive is a means of frightening the horses as they go from and come into the city.

Q. Are you acquainted with the manner in which French Street is crossed by the railroad?

A. I am. The railroad crosses French Street by a bridge, two bents of which stand in the street, and are about 20 feet apart. I never measured the height or breadth, but should judge from my impression in looking at it, that it is about 9 or ten feet high. I should think that it was not high enough for the passage of loads of hay, or other bulky material, especially with the driver on. A load of hay could be driven under it without the driver being on it.

Q. State whether you are acquainted with the topography of the country east of the town.

A. I have a general knowledge of it.

Q. State whether there is any difficulty in laying a railroad north of the present one.

A. From my general knowledge of the country and the general evenness of the surface, I should think there would be no difficulty in locating a railroad a half a mile either north or south of the present track without any material increase of grade or expense. My idea is that when you get more than half a mile north the streams begin to make ravines as they go towards the lake. And when you get more than half a mile to a mile south, you get towards the spurs of the ridges bounding the valley of the lake.

Cross-examined by Respondents.

The railroad crosses at grade.

Q. Could the railroad cross Peach and Turnpike Streets in the manner it now does, and be a less obstruction than it now is?

A. As to the manner of crossing I don't know that it could. If the switch referred to was west of the street, instead of east of the street, the obstruction would be much less.

Q. Why would the obstruction then be much less?

A. Because the crossing of the locomotive would then be much less frequent.

Q. Would it not be much more expensive to cross the valley of Millcreek a half a mile north of the present crossing, than at where it now does?

A. I think the crossing of Millcreek, a half a mile north, would be much more expensive.

Q. Would it not, in crossing the valley of Millcreek a half a mile

north of where it now does, obstruct the streets of the city of Erie as much as where it now crosses ?

A. I think not.

Q. Why ?

A. Because a large portion of the intercourse between the town and county would not pass a line, half a mile north of the present location.

Q. Where would that line, a half a mile north, cross State street ?

A. I could not answer exactly, but I think north of the public square. On looking at the map since answering, I count the distance to the centre of the public square, in addition to the width of the streets, to be 180 rods. My answer to the decreased obstruction was founded upon the belief that a half a mile north would throw the route north of the public square. I think still that it would obstruct less even there.

Re-examined by Complainants.

Q. To cross Millcreek one-half a mile north of the present location, would it not be necessary to cross it within the limits of the borough of Erie, as it was previous to 1848 ?

A. It would certainly bring it within those limits. To come to the borough boundaries, as they were prior to 1848, it would not be necessary to cross Millcreek at all. I was engaged as a civil engineer about eight years in the location and construction of canals, never of railroads.

Cross-examination resumed.

Q. Where in the city of Erie is your iron foundry and place of business located ?

A. On the block between 11th and 12th, and Peach and State Streets.

B. B. VINCENT.

Sworn and subscribed before us, May 5, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Pardon Sennett, produced by complainants, was sworn and testified as follows : I reside in Erie City, am an iron founder, and about fifty years of age. I have resided in Erie about 13 years. I know how the Erie and Northeast Railroad crosses the streets of the City of Erie. It crosses at the junction of Peach and Turnpike Streets, and the passenger depot is west of Peach Street, at the junction of Turnpike and Peach Streets. There are three tracks across the street at the junction there. Peach and Turnpike Streets are the principal streets leading into the city.

Q. From your knowledge of the manner that the railroad crosses

Peach and Turnpike Streets, and occupies them, is it an obstruction to their free use as common highways? if so, state why and to what extent.

A. I think it is a great obstruction to their free use by the frequent crossing of the cars and locomotives; a great detention to the people in passing and repassing.

Q. Do you know how it crosses State Street? if so, state how, and if it places any obstructions in the street.

A. I do. It crosses State Street on a bridge. There are four bents standing in the street betwixt 18 or 19 feet apart, about 19 I should think. It crosses French Street on a bridge. On French Street there are two bents on the street, about 19 feet apart, about 9½ feet high, between stringers. I should think it not sufficiently high, passing loads of hay and other bulky articles. I am acquainted with Penn Street. From the manner of the railroad occupying it, I should think it completely obstructed for the free use of it by teams.

PARDON SENNETT.

Sworn and subscribed before us, May 5, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Joseph Deemer, recalled by complainants, testified as follows:

Q. State whether you delivered copies of the ordinance of the 28th November, 1853, and of the preamble and resolutions of the same date here shown to you.

A. I delivered (I think on the 29th of November) a copy of the preamble and resolutions to Wm. S. Lane, and it is my impression a copy of the ordinance, preamble, and resolutions to Mr. John F. Tracy, as it was stated to me that there was no other agent of the company here. I am confident that I delivered a copy of the ordinance, preamble, and resolution to Mr. Tracy, and I don't remember of delivering but one to Mr. Lane. I think it must have been the ordinance. I believe these (referred to, and appended as Exhibit "C" and Exhibit "D") are copies of the ordinance and resolution I then delivered to Mr. Tracy. I understood that Mr. Tracy was Superintendent of the Erie and Northeast Railroad, and agent, and I knew him to be in the employ of the Erie and Northeast Railroad Company.

JOSEPH DEEMER.

Sworn and subscribed before us, May 5, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Exhibit B.

CHARLES M. REED, Esq., President of the Erie and Northeast Railroad Company.

Sir: You are hereby notified to change the location of the Erie and Northeast Railroad from a point on the east side of the Six-mile creek in the township of Harborcreek, to a point near Joseph Greenwood's house, as said railroad when made will materially and seriously obstruct the public road or highway, called the "Ridge Road," from the first mentioned point to the last, a distance of about one mile and a quarter, contrary to the 7th section of the act of assembly incorporating your company.

ROBERT MOORHEAD,
PHILIP D. BRYANT,
Road Commissioners.

Harborcreek, Nov. 14th, 1849.

Exhibit C.

The following preamble and resolutions passed the Select and Common Councils the 28th day of November, A. D. 1853, viz: .

Whereas, A preamble and resolution passed the Select and Common Councils, the 10th day of November, A. D. 1851, granting to the Erie and Northeast Railroad Company the privilege of laying down a track of railroad on the north side of Penn Street, and two or three tracks on Ritner Street, so far as said council had legal power and authority in the premises, on certain conditions therein set forth: And whereas, the following is one of the said resolutions, to wit:—

"Resolved, Further that the Select and Common Councils reserve the right to withdraw the privilege hereby granted, provided the use and occupancy thereof shall appear to them to be injurious to the interests and welfare of said city;" and whereas it now appears to the Select and Common Councils that the use and occupancy of said streets by the said railroad company as now managed, are injurious to the interests and welfare of the city. Therefore

Resolved, By the Select and Common Councils of the city of Erie, that the resolutions passed the 10th day of November, A. D. 1851, granting the Erie and Northeast Railroad Company the privilege of laying a track of said road on the north side of Penn Street, and two or three tracks on Ritner Street, be, and the same are hereby rescinded and repealed, and all rights and privileges thereby granted, are hereby withdrawn, annulled, and made void.

Resolved, That a copy of this preamble and resolutions be signed by the Mayor and Clerks, and sealed with the city seal, and delivered forthwith by the high constable to the president of the said railroad company, or one of their officers.

The above and foregoing is a true copy of preamble and resolutions passed by the Select and Common Councils, the date above written.

Witness my hand and the corporate seal of the city of Erie, this 2d day of May, A. D. 1854.

W. H. SHERMAN,
Clerk Select Council.

This paper referred to in testimony of Joseph Deemer as Exhibit "C".

JOSEPH DEEMER.

May 5, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Exhibit "D."

Ordinance to abate nuisances caused by railroads of the 28th November, 1853.

Whereas, The Franklin Canal Company, and the Erie and Northeast Railroad Company have respectively caused to be placed upon, over, and across divers of the public streets of the city of Erie, certain iron rails for railroad tracks, and certain bridges, embankments, ditches, timbers, and other erections and constructions, all of which are without authority of law, and obstruct the free use of said streets respectively as public highways. Therefore

1. Be it ordained and enacted by the Select and Common Councils of the city of Erie, and it is hereby ordained and enacted by the authority of the same; that the mayor of said city be, and he is authorized and empowered to issue his order to the high constable of the same, directing him to remove from such streets, or any of them, all, or any of such track or tracks, bridge or bridges, embankments, ditches, timbers, erections, and constructions whatsoever, or any part thereof, by whomsoever made or caused. And the high constable upon the receipt of such order, is hereby required forthwith to carry the same into effect, and to employ a sufficient force for that purpose.

2. Any person who shall in any manner obstruct or resist the high constable in carrying such order into effect, or shall replace, or aid in replacing any such track, bridge, embankment, ditch, timber, or other erection or construction upon or over any of said streets after the same shall have been removed as aforesaid, shall forfeit and pay to the use of the city a penalty of ninety dollars for every such offence.

3. That all privileges, or grants of privilege (if any exist) to any railroad company to place or maintain any track, bridge, embankment, ditch, timber, or other erection, or construction upon, over, or

across any street of this city, are hereby annulled and revoked, and the placing or maintaining of any such therein forbidden.

Ordained and enacted this 28th day of November, A. D. 1853.

Attest, A. KING,
Mayor.

WM. H. SHERMAN,
Clerk Select Council.

WM. THORNTON,
Clerk Common Council.

I hereby certify, that the above and foregoing is a true copy of an ordinance ordained and enacted by the mayor and councils of the city of Erie, the date above written. Witness my hand and the corporate seal of said city of Erie, this 2d day of May, A. D. 1854.

W. H. SHERMAN,
Clerk Select Council.

This paper referred to in testimony of Joseph Deemer, as Exhibit "D."

JOSEPH DEEMER.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Respondents' Testimony.

THE COMMONWEALTH OF PENNSYLVANIA, ex rel. FRANCIS HUGHES, Attorney General,

vs.

THE ERIE AND NORTHEAST RAILROAD COMPANY.

In the Supreme Court, Eastern District. No. 7 of Dec. Term, 1853.
In Equity.

And now to wit: March 25th, 1854, on motion of Mr. Dallas and Mr. Griscom, the court do appoint James Sill and Geo. H. Cutler, Esquires, jointly to be examiners to take testimony in the above case in the city of Erie, Pennsylvania. Ten days' notice to be given by either party to the other, of the time and place of taking testimony, and testimony to be taken in but one place at the same time.

Per Cur. ROBERT TYLER, *Pro.*

As per stipulation entered into between the parties respectively in the above cause by their counsel and submitted to the examiners, it is agreed that proof may be taken in said cause on one day's notice.

JAMES SILL,
GEO. H. CUTLER,
Examiners.

In the Supreme Court.

THE COMMONWEALTH OF PENNSYLVANIA ex rel. FRANCIS W. HUGHES, Attorney General,

vs.

THE ERIE AND NORTHEAST RAILROAD COMPANY.

No. 7 Dec. Term, 1853. In Equity.

Messrs. THOMPSON & GRANT,

Gentlemen: Take notice, that the Defendant will commence at 9 o'clock A. M., upon Monday, the 19th day of June, instant, to take testimony before the examiners appointed by the Supreme Court, at the office of James Sill, Esq., in Erie.

JNO. H. WALKER,
Atty. for Deft.

June 17th, 1854.

June 17, 1854, served copy on B. Grant, Esq., Attorney for complainant.

J. W. WETMORE.

THE COMMONWEALTH OF PENNSYLVANIA, ex rel. F. W. HUGHES, Attorney General,

vs.

THE ERIE AND NORTHEAST RAILROAD COMPANY.

In the Supreme Court of Pennsylvania, No. 7 Dec. Term, 1853. In Equity.

Evidence taken by Respondents before Geo. H. Cutler and Jas. Sill, Esqs., Commissioners.

Monday, June 19th, 1854. Examiners met pursuant to adjournment, and Hon. James Thompson appeared as Counsel for the complainant, and Messrs. Walker and Wetmore as Counsel for Respondents, when William W. Reed, produced by the respondents, was sworn, and testified as follows: I reside in Erie, and 30 years of age, and am a civil engineer. I was engaged on the Erie and Northeast Railroad as a civil engineer, on all the surveys and locations, from its commencement, until the completion of its grading. I left when the track was about half laid. During this time, a number of lines were run, and I became very well acquainted with the country between Erie and the New York State line.

Question. Are you acquainted with the crossing of the Buffalo road by the railroad at Mills' in Harbor Creek township?

Answer. I am.

Q. Does the railroad cross the Buffalo road at that place at or near grade, and state in what manner it crosses the same?

Ans. It crosses at about grade and diagonally.

Q. State whether the crossing at that point is as good as it could be.

Ans. It is. The track is planked over, I should say, 350 feet, for the passage of teams. I made an examination of it within a week. It is planked both between and outside the rails. It is usual, on railroad crossings, to plank by laying a plank on each side of the rail, and fill between the plank with gravel, but this is planked entirely inside the rails.

Q. State whether at the crossing, teams have not more room for crossing than the width of the road.

Ans. Teams can drive on either side of the track a distance of 300 feet, and then cross the track direct. I am familiar with the Buffalo road, and the crossing by the railroad at Plara and Gilbert Elliott's.

Q. State how often the railroad cross the old Buffalo road at or near the Elliotts.

Ans. It crosses twice inside a distance of from 60 to 80 rods. I can't be positive as to the distance. There is a sharp angle in the old Buffalo road, and the railroad crosses twice there, leaving a portion of the Buffalo road south of the railroad.

Q. State the character of the country as to grade between the crossings at Elliott's, and the crossing at Mills'.

Ans. It is very uniform with the exception that there are two ravines; one small one west of Gilbert Elliott's, and a larger one east of Plara Elliott's, at the point where the railroad crosses the public road, called Elliott's Run, sometimes called Harborcreek.

Q. State how high the embankment of the railroad is, within the bounds of the old road west of the bridge.

Ans. At the bridge the embankment is about eight feet high at the point where the railroad crosses the Buffalo road, but runs out to a grade a little before it reaches P. Elliott's running west. The third crossing is the one I have been explaining, being an embankment of about 8 feet and the bridge over Elliott's Run. The bridge and embankment occupy the old Buffalo road about one hundred and fifty feet.

Q. State what disposition was made of the old Buffalo road in order to avoid these two crossings.

Ans. The road was changed so as to avoid the crossings at that point. The road was made shorter, the grades made easier, and a better bridge made over the run. A better road in every respect was made.

Q. State whether the road was not altered in pursuance of an expressed wish on the part of the Elliotts, and other land holders in that vicinity.

(Counsel for complainant objects to this question, because the declarations of the Elliotts and other landholders in the neighborhood, are not evidence and could give no rights to the company that they

did not possess by their charter; and because they were not township authorities, and could be witnesses themselves.)

Ans. It was.

Q. State whether the straightened road was not used during the construction of the railroad, and whether it has not been used since.

Ans. It has.

Q. State whether you have read the testimony of Irwin Camp in this case, and if so, whether you are acquainted with the route he recommends in order to avoid the crossings.

Ans. I have. I am also acquainted with the route recommends and have, since reading his testimony, made a reconnoissance of the route he recommends.

Q. Would the route recommended by Mr. Camp, in your opinion be as good a route, and less objectionable at the crossing of the Buffalo road, as the present one?

Ans. I think it would not be as good a railroad line. It would increase the cost, increase the length, and increase the curvature of the line. I don't think the crossing would be as good as the present one; because, though it would cross a little more directly, it would cross on a curve, and curving on both sides of the crossing would make one long curve, and be more dangerous than the present one. There are also houses, which, in coming from the east, would prevent a view of the crossing until within four or five hundred feet, coming from the west a view can now be had for a thousand feet, but if houses were built there, or orchards planted, they would intercept the view the same as it is upon the east side.

Q. What is the length of curvature upon the route recommended by Mr. Camp?

Ans. Eight thousand feet with the length of radius he recommended. It would be a practical impossibility to put the line in as recommended by Mr. Camp, with half degree curves. The length of tangent between Walter Greenwood's and Besleys, not being sufficient for half a degree curve, that being a curve of a radius of 11,460 feet.

Q. From your experience on railroads, I wish you to state whether you do not find less accidents occurring, where the railroad crosses upon a straight line than upon a curve, and if so, why?

Ans. There are less accident and less danger in crossing on a straight line than on a curve.

Q. State whether there are not less collisions on straight roads than on curved?

Ans. There is a great deal less. I think that there is no danger of collision on straight roads, except from gross carelessness, and there is very great danger of collision on curved roads. Running on a straight line of railroad train can be seen three or four miles ahead, and there is very little danger of collision except from gross carelessness.

Q. State whether at the crossing in Harborcreek, there is not a

sufficient view each way to avoid all danger except from gross carelessness in crossing.

Ans. I think there is. There is not the slightest necessity of any one's being run over there.

Q. Would it be practicable to have built a railroad from Erie to the New York State line north of the Buffalo road?

Answer. It could not have been done without enormous expense.

Q. Why?

Ans. There are two objections, first the great increased expense of crossing the gulf, and secondly because the ground east of the Twelve Mile Creek is about 60 feet higher than the ground west of Moorehead's Run, there being a rise of 60 feet in a distance of 3,000 feet. This rise extends from the Ridge Road to the Lake, and there would be no possibility of getting around it; it must be graded through. To get a line north of the road would make a longer line, require heavier grades, require a good deal of curvature, and, in addition to these objections, I don't think it could be graded for three times the expense that it cost to grade the present line. I was all through this country on the location of the road, the whole country was examined at that time.

Q. Commencing north of the Buffalo road and near James M. and Joseph Y. Moorehead's, could a railroad be located from there to the present crossing of the railroad on 16 mile creek?

Ans. It is an impossibility without using heavier grades than are used on the Erie and Northeast Railroad. Starting from a point at the foot of the ridge, at Jos. Y. Moorehead's, to the 16 mile creek at the present crossing, the average cutting would be 40 feet the whole distance. The grade line would then strike at the 16 mile creek, 10 feet below the bed of the creek. A line with any grade would be very expensive. It would increase the distance or length of the road. It would do much more injury to property than is done on the present line. It would cross the Buffalo road diagonally, nearly as diagonally as it does now, and with deep cuts, unless a very heavy grade was used, say a grade of 60 or 70 feet to the mile.

Q. State whether the crossing at that point would, as you have described it, be as dangerous as the crossing at Mills'.

Ans. If crossed with a grade it would be more dangerous, and if crossed with a bridge less dangerous.

Q. State whether you have read the testimony of Anthony Saltsman, and are you acquainted with the route he recommends?

Ans. I have read his testimony, and am acquainted with the route he recommended.

Q. State whether it is objectionable, and why.

Ans. I would say regarding that line, that it is a practicable impossibility, without the use of heavy grades, and with them more expensive than the present line, and crossing the Buffalo road worse than it now does at Mills' in Harborcreek. It would cut the farms on the line diagonally, and do much greater damage to property than

the present line. There was another line recommended crossing the Buffalo road and running up a ravine near James Moorehead's. I regard it as impossible without the use of heavy grades. The elevation of land near James Moorehead's, north of the Buffalo road, is 25 feet above Erie. The elevation of the point where it was proposed to intersect the present line of railroad, is 91 feet above Erie, making a difference of elevation of 66 feet, to be overcome in less than a mile.

Q. State whether you are acquainted with the location of the railroad through the town of Erie; and state whether it passes along the line of lots.

Ans. I am. It passes upon the line of lots.

Q. State whether it crosses Ash Lane at grade.

Ans. It does at or very near grade.

Q. How as to Parade?

Ans. Parade is very near grade. The railroad is a foot or a foot and a half above grade, as the street was when the road was built, but the plank road on Parade Street has been turnpiked up to the railroad. The railroad crosses all the streets east of French at right angles, at or very near grade.

Q. State as to Peach and Turnpike Streets.

Ans. They are crossed at grade.

Q. State as to State Street.

Ans. State Street is crossed by the railroad on a trestle bridge, the distance between the bents over State Street is 18 feet 8 in. The distance in length from the travelled road to the bottom of the stringers, is 13 feet 2 inches.

Q. How wide is the plank road on State Street under the R. R. bridge?

Ans. The plank road under the bridge is 14 feet wide, and 16 feet wide on either side of the bridge. I should judge the plank road to be elevated above the bed of the creek about 4 feet.

Q. Was State Street, at that point, improved and occupied at the time of the location and construction of the road?

Ans. At that time it was the bed of Mill Creek, and was not used as a road.

Q. Was State Street improved at that point by the city of Erie, or by the plank road company?

Ans. It was, I think, by the Erie and Waterford Plank Road Company.

Q. What distance is there between the east and west side of the plank road, as used, and the bents?

Ans. There is 4 feet 8 inches under the bridge, between the plank and the bents, unoccupied by the travelled road under the span.

Q. In case it was desired, could not another road be used, under another span of the bridge, either east or west, and within the bounds of the street?

Ans. It could.

Q. How much space is occupied by each bent?

Ans. Sixteen inches of the street is occupied by each bent.

Q. Is there a bridge, north of the railroad bridge, over McSparren's tail race? and state how wide it is.

Ans. There is a bridge over McSparren's race, about 400 feet north of the railroad bridge, which is 15 feet wide in the clear.

Q. State how French Street is crossed by the railroad.

Ans. By a trestle bridge.

Q. How wide is the span?

Ans. Eighteen feet five inches in the clear between the bents.

Q. How high?

Ans. Nine feet five inches. When the bridge was put in it was excavated a foot lower than it now is. It has since been filled up a foot. It was excavated to the bottom of the sills. Now it has been filled up above them.

Q. Could French street at that point be excavated any lower and admit of the water running off?

Ans. It might, I think, be excavated 3 feet and be of sufficient height for the water to run off on the line of the road by altering the grade of the street. It might be excavated 4 or 5 feet, and the water drained into Millcreek. The grade of the road would probably have to be altered 5 or 600 feet in length. I did not notice particularly.

Q. Would it not make a more uniform grade of French street by excavating the same 3 feet under the railroad crossing?

Ans. It would to run say 600 feet north, and cutting 3 feet under the bridge, run 500 or 600 feet south of the bridge. At present it rises from each direction up to the bridge.

Q. State whether there are not other spans on this street east and west of the one you have described, and whether they are wide enough for a wagon to pass.

Ans. There are two spans. They are both wide enough for that purpose. The west span is already used, and it would require a few minutes' work with an axe to cut away some sub-sills, under the east span, to permit it to be used by a wagon. Originally these spans were of the same width as those on State street, but it has been reduced or made 3 inches narrower by the spiking on of some braces.

Q. State whether immediately west of French street, the land sinks into the flat of Mill creek.

Ans. It does immediately, and there would be no difficulty in draining that way.

Q. Is not the grade of the railroad in Erie as well adapted to the streets as it can be, and cross the same?

Ans. The grade fits the street as nicely as any uniform grade can be made to.

Q. Do you consider the railroad crossing the streets in Erie as any obstruction to them?

Ans. I don't consider it any obstruction to any of the streets ex-

cept French street, and it would not be so there, if the city would allow the grade of French street to be cut down, and if it was, as it was originally made, it would not be any obstruction, except that it would not permit very high loads of hay to pass there.

Q. As an engineer, state whether, in your opinion, the E. & N. E. Railroad is not judiciously located and in its proper place.

Ans. I think it is the best location it is possible to make between Erie and the New York State Line. I make this statement with a thorough knowledge of the country from Erie to the State Line. I think it is in its proper place, and could not be changed without making a poorer line and more expensive.

Q. You have described the crossing of the road at Mills'. State whether the road as there constructed is an obstruction to the Buffalo road.

Ans. I don't think it is.

At half-past 12 o'clock the Examiners adjourned until 2 o'clock P. M.

JAMES SILL,
GEO. H. CUTLER,
Examiners.

2 P. M., Examiners and parties appearing, W. W. Reed being on the stand.

Cross-examined.

Q. At what time did you go on the E. & N. E. R. R., and who were the chief and assistant engineers in making the location?

Ans. I went on the road, I think, in April, 1849. Milton Courtright was the chief engineer. Mr. Wilson King and J. C. Spencer ran the compass line, on location James C. Reid ran the level principally. I entered into the employment of the road as rodman. I continued to act as rodman during the location of the road.

Q. State who were the chief engineer and assistants during the construction of the road.

Ans. Irvin Camp was chief engineer, and James C. Reid and I assistant engineers. I became assistant, or commenced doing assistant's duty, about the first of January, 1850.

Q. Principal or second assistant?

Ans. There were no principal assistants.

Q. Was not Irvin Camp on the road before the construction was begun, and continued on until it was finished?

Ans. He was.

Q. Had you ever been employed on the location or construction of railroad before your employment on this road?

Ans. I had not, was my first employment.

Q. When was this road finished?

Ans. I did not remain on the road until it was finished, and cannot say exactly. The rails were about half laid when I left.

Q. What road have you since been employed on?

Ans. On the Ontario, Simcoe, and Huron R. R., Canada West.

Q. Are you employed as an engineer by the company, for the construction of the road or by the government? How and in what capacity are you employed?

Ans. I secured my appointment from the chief engineer of the road, and am employed as a resident engineer.

Q. Have you not been absent from this place until very recently, and have you not returned at the request of the Erie and Northeast Railroad Company, or some of its officers, to make the examination testified to by you in chief, and are you not in their employment in doing so?

Ans. I have been absent for nearly three years, but have made Erie my home, and have been here occasionally on a visit, I have returned and made the examination spoken of, at the request of Mr. Courtright; I am not in the Railroad Company's employment in doing so. I don't know that I am to get any pay for it, I don't expect any pay for it.

Q. How long have you been here, in making these explorations? Who assisted you, and what instruments did you use?

Ans. I have been here a week. None assisted me. I made the examination as to the level and crossings at Harborcreek, with the eye. As to the other lines sworn to, my opinion was formed from an examination of the original level note, and of a map of all the lines run during the location of the road, and from the knowledge I possessed of the nature of the country, by being engaged in the running of those lines and on the road about that country, for some two years.

Q. Whose field notes did you have, and who gave them to you?

Ans. I had my own. I kept notes during the survey, they were the same as those kept by Mr. Courtright and James C. Reid. There were three sets of notes, kept respectively by the leveller and two rodmen. They corresponded.

Q. How did the rodmen keep notes except from what the leveller told him?

Ans. In the usual manner. I was instructed by Mr. Courtright how to keep the notes.

Q. You say you made the examinations from notes taken at the time. If so, could you find the bench marks at this time, so as to ascertain the lines and distances, without a compass and chain?

Ans. I certainly could tell with accuracy, for in addition to the notes I had a plan, which showed me the distance and elevation.

Q. Did you make that plan yourself, if not, where did you get it, and from whom?

Ans. I did not make the plan. It was made, I think, by J. C. Spencer, assisted perhaps by James C. Reid. I got it in the office of the Erie and Northeast Railroad Company, where it has been preserved. It was the original map of the plan and location of the

railroad, and is now in the office of the Erie and Northeast Railroad.

Q. Was not this examination of the road made privately, and without any notice to those representing the commonwealth, and intended to be private until testified to?

Ans. There was no attempt at privacy made. I was willing that it should be known. I told many about town that I was making it. So far as I know, there was no intention to keep it private, although no notice was given to the commonwealth?

Q. Who did you tell?

Ans. I don't know that I can mention any one that I told about town. I told Gilbert Elliott of Harbor Creek, that I was going down to Harbor Creek to make the examination. When I went to Harbor Creek, I made my examination and went off. On reflection, I remember that I mentioned my employment to A. H. Caughey, M. W. Caughey, William Brown, J. W. Wetmore and Wm. Brewster of Erie.

Q. How long were you occupied in Harbor Creek, and on the routes to the crossing of the 16 mile creek at this time, or did you make it without going on to the ground, from notes and diagrams?

Ans. I went on to the ground at Harbor Creek, and paced over the ground. I was at Harbor Creek not more than two or three hours. It took very little time to make this reconnoissance. I made the examination of the routes to 16 mile creek crossing from the map. I did not go on to the ground, excepting as I have stated, having been familiar with the ground before.

Q. If the tangent spoken of by Mr. Camp was not long enough, between Besley's and Greenwood's, to allow of his curve, was there any natural obstruction to lengthening it, either by beginning further west or extending further east, or both?

Ans. He proposed running it in such a way as to require sharper curves than he recommended. By changing the line and making a gentler curve, there were no natural difficulties in the way of the curvature, except that a different line would have to be taken, which would interfere with the buildings, which I would not think it possible to avoid in getting a line through. I cannot say how many buildings, or whose.

Q. Where did you see Mr. Camp's testimony, was it signed by the Commissioners, or from whom did you get it?

Ans. I saw it at Mr. Walker's office. I got it from Mr. Wetmore. I did not notice the signature of the Commissioners. If signed by them, I did not notice their signatures. It was at the same place and manner I saw Mr. Saltsman's and McCord's testimony.

Q. You say that the road at Mills' is planked clear over. From the appearance of the work, has it not been recently done, and does not the work appear new?

Ans. I don't know that it has been done recently. The plank look old. They had the appearance of having been used some time.

If planked lately it must have been with old plank which had been a year or so in use.

Q. At what angle do the railroad and Buffalo road approach east of Mills's and depart west of that point?

Ans. I can't say. I could give it in ten minutes, if I had the plan to measure the angle.

Q. How near to the point where the railroad first touches the Buffalo road, east of Mills', must one be before they could see a hundred rods along the railroad towards Erie west of where it leaves the road there?

Ans. A person would have to be within 30 or 40 feet of the track.

Q. In going east from Erie, how far before reaching the crossing could a person see a locomotive or cars coming west?

A. The conditions on each side would be the same. I did not examine particularly on each side, and cannot be positive as to the matter.

Q. Has not the road made by the Company at Elliott's, for the Buffalo road, two crooks in it, one beginning at the creek, and the other where it leaves the railroad?

A. It makes a slight turn after leaving Stillman's, and a slight angle where it intersects the old Buffalo road. Before, there was one sharp angle in the Buffalo road at Plara Elliott's.

Q. How far from the track of the railroad is this road, and what is the elevation of the railroad above it?

Ans. I don't think it is any place more than 100 feet from centre to centre, of either road at any point, nor the difference of elevation more than five or six feet in the ravine, and after it gets up from the ravine, not more than two feet.

Q. Is not the Buffalo road there entirely occupied by the railroad, and for what distance?

Ans. The railroad crosses the old Buffalo road twice there. It is entirely occupied in the two crossings for the distance of about 24 rods.

Q. Do you not think that the nearer the road crossed at right angles, if at grade, the less the obstruction would be to the road?

Ans. It is better to cross at right angles, it could be crossed quicker. I don't think it would be any obstruction if crossing at right angles or askew, although there would be a little difference.

Q. How far is it from Erie to Joseph Y. Moorhead's?

Ans. It is ten miles by railroad in a direct line. I don't know how far it would be by the Buffalo road.

Q. Can you tell the width east and west of the ridge, that you have described east of Moorhead's; did you ever measure its height or width personally?

Ans. In width it extends to the State line. There are two benches, one extending from Erie to the 12 Mile Creek, and about the elevation of Erie. The other from the 12 Mile Creek to the State line,

is 60 feet higher. I have level notes taken by myself when James C. Reid carried the level.

Q. Is not that ridge east of the 12 Mile Creek, as far as it goes south?

Ans. The 12 Mile Creek breaks through that ridge partially, a portion of it crossing the creek, at what is called Moorehead's run, and reaches a mile this side (west) of the 12 Mile Creek on the line of the present railroad.

Q. How far from the Buffalo road, at and near Moorehead's, and for two miles west of Moorehead's, is the present location of the railroad?

Ans. I think it is about half a mile south.

Q. Do you say that the railrad as it crosses Turnpike street, and Peach street, is no obstruction to them?

Ans. I do not consider it any obstruction.

Q. Is it any obstruction to the free use of them as public highways?

Ans. I think not. I don't consider anything an obstruction at a railroad crossing which gives community the free use of the crossing when the locomotives and trains are not passing.

Q. Do you know whether the city has refused to alter the grade of French street, and if so, why?

Ans. I don't know.

Q. What other road or roads, excepting the E. & N. E. and Canada road spoken of, have you been employed upon as engineer, if any?

Ans. While engaged upon the E. &. N. E. Road I was with Mr. Camp, engaged for about a month in the preliminary survey of the Little Valley Railroad, with the exception of that no other.

Q. Is not Mr. Courtright a contractor in that part of the road in Canada on which you are a resident engineer, and is he not the same gentleman who assisted Mr. Walker in examining yesterday?

Ans. He is.

Q. Are not the gentlemen you informed of your going to examine upon the subjects here testified to, all in the employ of the E. & N. E. road, or officers or counsel of the same?

Ans. No.

Q. Specify.

Ans. Brewster is not, neither is M. W. Caughey, or A. H. Caughey.

Direct Examination resumed.

Is it not a fact, that the more diagonally a railroad crosses a public road, the further a person travelling upon such road can see the locomotive and cars upon such road as he approaches the crossing?

Ans. It is. At a right angled crossing, they have to drive down to the track before they can see the cars crossing.

Q. You have stated in answer to one of the complainants' questions, that in approaching the crossing at Mills' coming from the

east, you could not see along the railroad, until you were within 30 or 40 feet of the crossing. I wish you to state what obstruction there is to intercept the view of the cars approaching the crossing from any point, east of the crossing the cars going east?

Ans. There is nothing when you are within the bounds of the railroad.

Q. What is there when you are 100 rods off from the track, you coming west, and the cars going east?

Ans. So soon as the observer gets so as to see by Mills' house, there is nothing to obstruct the view. I will add, regarding such matters of observation of trains, that I did not make any examination on this subject, and am not well prepared to answer.

Q. State whether in order to get through the Moorhead ridge it was not necessary to commence west and gradually ascend the ridge in order to get over it, to avoid the deep cutting, and whether it was not that necessity which brought the road through Harborcreek as it now runs?

Ans. It was necessary with the grades used on the E. & N. E. R. R., to commence west and gradually crawl up the ridge, until we reach the summit of the Moorehead ridge. It was this necessity which caused the present location of the railroad in Harborcreek Township. It could not have been located any other way, with 15 foot grades without greatly increasing the expense.

Cross-examination resumed.

Q. Who decided upon the location of the railroad?

Ans. The Board of Directors. The chief engineer reports to the board and virtually decides and the board pass upon it.

WM. W. REED.

Sworn and subscribed this 19th day of June.

JAMES SILL,
GEO. H. CUTLER,
Examiners.

Clark McSparren, being produced by the respondents, was affirmed, and testified as follows:—

I reside in the City of Erie, the place of my nativity, am engaged in milling, and am 40 years old.

Q. State whether you were a member of the Council of the Borough of Erie during the years 1849 and 1850.

Ans. I was.

Q. State whether, during the month of December, 1849, you were appointed one of a committee to confer with the directors of the Erie and Northeast Railroad Company and their engineer, as to leaving a carriage-way and side-walk unobstructed under the trestle work of the bridge across Mill Creek on State Street?

Ans. I was appointed one of such committee. Mr. Dunlap and

I were that committee. The following is a true copy of the minutes of the council at that time. I took it from the records of the then borough council (now city), page 209, Dec. 21, 1849, as follows:—

"Messrs. Dunlap and McSparren were appointed a committee to confer with the Erie and Northeast Railroad Company and their engineer as to leaving a carriageway and sidewalk unobstructed under the trestle work across Mill Creek on State Street."

Q. Did you confer with the directors and engineer of the E. & N. E. R. R. Company as to the duties devolved upon you by the council?

A. I conferred with the engineer, and I presume that Mr. Dunlap did too.

Q. Was the bridge erected by the railroad company in accordance with the resolutions passed by the borough council, a copy of which is above given?

Ans. I so understood it.

Q. Did you verbally report to the burgess and council that the bridge was built in accordance with the instructions given in the resolution?

Ans. I reported verbally.

Q. Did the burgess and council acquiesce in the same?

(This question objected to by complainants.)

Ans. I never heard any objections. At this time State Street was not opened or travelled south of the interception of State by Turnpike Street, and it was in contemplation of this street being opened that these proceedings were had.

Q. State whether, on the 20th March, 1850, you were not by the burgess and council appointed by resolution one of a committee to examine and report the propriety of letting the E. & N. E. R. R. grade down French Street at the point where the railroad crosses that street, so as to let teams and carriages pass under said railroad at that point?

Ans. Mr. Dunlap, Mr. Perly Arbuckle and myself were appointed that committee. I think the following is a true copy of the borough records (at that time) of proceedings of the burgess and council:—

Page 220. March 2d, 1850.

"On motion Mr. Dunlap, it was resolved that a committee be appointed to examine and report the propriety of letting the E. & N. E. R. R. Company grade down French Street at the point where the railroad crosses said street so as to let teams and carriages pass under said railroad. Messrs. Dunlap, Arbuckle and McSparren, committee."

Q. State whether the committee did examine and report as required in the above stated resolution.

Ans. We did examine and report. The following is a true extract of the proceedings, and record of the council at that time. Page 221, March 8th, 1850:—

"Mr. Dunlap, chairman of the committee appointed to examine

the propriety of letting the railroad company grade French Street, report, that they think the street would be better to run under the railroad track, than to run over it, and on motion it was resolved that the committee be authorized to make arrangements with the railroad company to grade said street at that place."

Q. State whether as such committee you did not make an arrangement with the railroad company to grade French Street at that point, so that the railroad would pass over the street by a bridge at that point.

Ans. Such an arrangement was made with their engineer, Mr. Camp.

Q. Was not the street there graded so that the street passed at that point under the railroad?

Ans. It was.

Q. State whether the burgess and council did not, in March, 1850, grant leave to the E. & N. E. R. R. Co., to run a track down State Street from the intersection of their road on Turnpike Street to State Street, and down said street to the harbor.

Ans. It is my opinion that they did; that there was a grant. I remember that I was on a committee to get the consent of the property holders where the grading or cutting down of the street would be necessary. The following is a true extract from the minutes of the proceedings of the burgess and council of the Borough of Erie, from page 222, March 14th, 1850:—

"Leave was granted to run the track down State Street, from intersection Erie and Waterford Turnpike road."

Q. You have testified that on the 2d of March, 1850, a committee of which you were one was appointed relative to the grading down of French Street. State whether it was not before that the intention of the company to cross French Street at or near grade, and whether the council did not suggest the propriety of cutting down and crossing on a bridge as more convenient and more safe.

(This was objected to by complainants, as the acts of the council can only be shown by resolution.)

Ans. Originally at that point there was a ridge or bluff, and it came within two feet of the grade of the railroad, and it was, I understood, the intention of the railroad to go on and fill up. I recollect they had began to fill up before the committee was appointed. The alteration there I think originated with the property holders. Mr. Brewster was a director and property holder at the time. I cannot state as to exactly how it was brought before the council, whether by petition or verbally, but it was brought before them and this committee appointed.

At 6 P. M. the examiners adjourned until June 20, at 8½ A. M.

GEO. H. CUTLER and
JAMES SILL,
Examiners.

Tuesday, June 20th, 8½ A. M. Examination was resumed, and Mr. McSparren being on the stand, direct examination was resumed.

Q. State whether Peach and Turnpike Streets were graded by the burgess and council of Erie, with the view to the crossing of the same by the E. & N. E. R. R. whilst you were a member of the council, and whether you attended to the same.

Ans. Peach Street was graded. The borough surveyor gave the grade under the direction of the burgess and council, from Buffalo Street (then the south limits of the borough) to the junction of Turnpike and Peach Streets, where the E. & N. E. R. R. now crosses Peach Street. This was at the time at which the engineer was preparing the bed of the railroad, and the grade was fixed with a view to accommodate the grade of the street with the railroad. I was at that time a member of the council. The engineer of the road at that time called upon the council and requested them to give the grade at that point. In pursuance of that it was done, and I think the railroad grade is at within a few inches of the grade then given.

(Complainants objected to the above question, and all evidence of the acts of Council, unless shown by their minutes.)

Q. Was this grade given, and a railroad laid upon the same, with the knowledge of the burgess and Council of Erie?

Ans. It was, and met with their entire approbation.

Q. State whether the railroad crosses Peach Street and Turnpike Street at or near grade, and whether the railroad at those crossings obstructs or impedes the free use of the same as public highways?

Ans. My opinion is, that the grade is about at the height of the street given at the time by the borough surveyor, and that it is about at grade, though it may vary six inches. As to the construction of the road the manner in which it is built is of itself no impediment. The rails, as they are laid, are not so much of an impediment as other causeways in the city constructed and kept up by the city authorities.

Q. State whether State Street was occupied as a highway before the location and construction of the railroad; and if not, in what condition it was?

Ans. State Street was impassable for about 452 feet north of the railroad, and from that point to the extreme southern limits of the borough was impassable. Millcreek occupied the chief part of the street at that time, from the railroad north nearly to the junction of State and Turnpike Streets.

Q. State whether at that time you owned the property on State Street, in that vicinity?

Ans. I owned at that time 300 feet on the west side of State Street north of the railroad, between Turnpike and State Streets, where my mill now stands. At that time I owned east of State Street, north of the railroad, about 120 feet.

Q. State whether you are acquainted with the manner in which the railroad crosses Ash Lane, Parade, German, and Holland Streets, and whether it passes the same at or near grade?

Ans. I am acquainted with the nature of the ground at the different crossings. From 12th Street to the city boundary south, Ash Lane is impassable for teams, and has never been worked. It is in a state of nature except what the railroad has done upon it. Judging from the eye, I should think that the crossing of Ash Lane by the railroad would be just about at grade. At Parade Street the road is nearly at grade of the Plank Road as worked; there may be probably one foot of an elevation, not to exceed that. It is planked up and over the railroad entirely; there may be a little difference. German street is not worked for 100 rods north of the railroad, and there is no work south of the railroad to the southern boundary of the city. From the appearance of the ground, the nature of the ground is about the same as at Parade, and I should think the crossing would be about the same. On Holland Street for about 10 rods north of the railroad, no work has been done on the Street, from appearances. South of the railroad it is not a worked or travelled road. At the crossing on Holland Street, the elevation is greater than at any other point. I should think the elevation now was about 4 feet. If the street was turnpiked I think a very comfortable road might be made over it at an elevation of not more than two feet.

Cross-examined by Complainants.

Q. Was not 12th Street the southern boundary of the borough of Erie up to 1848, and were not State, French, Holland, German, and Parade Streets, opened, worked, and travelled public highways within the borough of Erie up to that date?

Ans. Twelfth Street was originally the southern limit of the borough of Erie, up to 1848, though I cannot state definitely as to the time of change. State Street was opened entirely. French Street was opened to 12th Street. Holland was worked to about 7th Street. At this period of time but little more of Holland is passable. From the centre between 7th and 8th to 11th, it is now impassable. At that time from 11th to 12th was then passable. It runs along much of it in the creek between these points, and has not been as yet improved. At that period of time German was not passable its entire length to 12th. Parade from 2d Street was then passable its entire length to 12th.

Q. How far south of 12th Street does the railroad cross those streets as you have described?

Ans. About 60 rods.

Q. Were not the streets that you have enumerated old original streets laid out when the town was laid out?

Ans. I understand so.

Q. Were not the borough authorities in the practice of opening portions of the streets as residents and travel on them required?

Ans. They were, and leaving portions unopened as property holders and residents might petition.

Q. Was not the grade of Turnpike and Peach Streets, at the cross-

ing of the railroad, fixed to correspond with the grade north of it, as is was at the time the road was laid?

Ans. At the time I speak of, all I can say is, that the grade was fixed from Buffalo Street to where the railroad crosses at the intersection of Turnpike and Peach, and whether the grade was extended further north I do not know.

Q. Has the grade of Peach and State Streets been changed north of 12th, since that time?

Ans. I cannot say.

Q. Have these streets been cut down or filled up since that time, north of 12th Street?

Ans. About the time the improvements were being made around the railroad, Peach Street, opposite the depot, grounds had been filled up, and below Washington Street there had been excavations made by the city and plank road.

Q. Was this north of 12th Street?

Ans. It was north of 12th Street. I can't say how much alteration there had been north of 12th Street. There has been little or none north of 12th Street.

Q. Was not Mr. Brewster owner of property adjoining on the railroad as located, and was he not burgess in 1849, and state what property he had there?

Ans. He was burgess at that time. He owned property near the depot grounds, south of the railroad, but not adjoining the line of the railroad. He owned one-third of an interest in a water privilege of Millcreek, together with an interest in land equal to 6 or 8 town lots. On French Street, 200 feet south of the railroad, he owned 8 lots of 80 feet each. On State Street, south of the railroad 600 feet, he owned 2 lots, making 160 feet on the east side of State Street. This was all the land he owned there, except the interest in the water privilege, and his interest in the woollen factory.

Q. You state that the subject of the crossing of French Street by a bridge was brought up by the property holders along the line of railroad there. State if Mr. Tracy did not own property there, and was not a director of the road at the time? State the extent of his property there and location with reference to the road?

Ans. I stated that I could not state just how the matter was brought before the Councils, whether by petition or verbally by property holders interested on French Street. Mr. Tracy did then own property east of French Street, between 12th and the railroad, French Street and Holland Street. It was thus bounded by French on the west, south by the railroad, east by Holland Street, and north by 12th Street. I can't say as to whether he was director of the road at that time.

Q. If Mr. Tracy was not a director of the road at that time, was he not very actively engaged in its location and construction, not only as regards the location of the road in town, but elsewhere?

(Counsel for respondents object to this question on the ground that

it is not cross-examination of any subject introduced in the direct examination.)

Ans. I stated that I could not say as to his being a director. I understood that he was a contractor on the road. He was one of the contractors of the first mile, which was from the depot east one mile. I can't say as to his being actively engaged in its location. The present line of location had his preference, and he advocated it.

Q. Was not Mr. Courtright the engineer of the company, and was not he a holder of property in that neighborhood also; and state where his property was situated, if he had any?

(Respondents object to this question for the same reason that objection was made to the former question.)

Ans. Mr. Courtright was chief or principal engineer. He was the owner of property at that time south of where the present depot is, south of and adjoining Penn Street, between Sassafras and Peach Streets, amounting to about nine acres.

Q. At the time that you state that a committee of the Council, of which you were one, called on the company to leave a carriage way and sidewalk under the bridge on State Street, had not the road been located in town and the construction of it commenced?

Ans. I think it had. The committee were appointed by the Council on the 21st of December, 1849.

Q. You state that privilege had been asked for and granted to lay a track down along State Street to the harbor at Erie in March, 1850, from the intersection of Turnpike Street and State Street. Was any such construction ever made, and was not the permission afterwards rescinded by the Councils?

Ans. The construction has never been made, and, as to its being rescinded, all I know is from report. I understand the Councils have rescinded all resolutions giving privileges to the railroad within the bounds of the city.

Q. As to the time spoken of by you as to acting as committee man in regard to French Street, and in getting the consent of property holders spoken of on State Street in 1850, was not the railroad in progress of construction within the borough limits at that time?

Ans. It was.

Direct Examination resumed.

Q. State whether, in March, 1850, you were appointed one of a committee to set the grade of Peach St. from 12th to Buffalo St.

Ans. I was.

Q. Annex, if you please, to your testimony, the proceedings of Council appointing that committee.

Ans. It is as follows from the borough record, page 221, March 8, 1850:—

"Council met. Mr. Dunn came and asked the Council to set a grade for Peach Street, and, on motion of Mr. Skinner, it was re-

solved that Mr. McSparren and Brewster be a committee to set the grade of Peach Street from 12th Street to Buffalo Street."

Q. State whether, in October, 1850, Mr. Camp, on the part of the E. & N. E. R. R., asked the Council of Erie to grade Peach and Sassafras Streets, and annex to your answer the proceeding of the Council thereon?

Ans. Mr. Camp called upon the Council relative to the grading of Peach and Sassafras Streets on October 11th, 1850. The following is a true extract of the borough records of the action of the Council upon that subject at page 260, October 11th, 1850: "Mr. Camp appeared on the part of the E. & N. E. R. R. Co. and asked the Council to take some measures in relation to the grading of Peach and Sassafras Streets; and, on motion of Mr. McSparren, it *was resolved*, That the Burgess and Town Council meet to-morrow morning at 8 o'clock, near the City Mills, and establish a grade for Peach and Sassafras Streets."

Q. Did you meet in accordance with the above resolve?

Ans. We did. I can't say whether we were all there. The Burgess was there I recollect, and other members of the Council whom I can't now name.

Q. Were you, in the month of October, 1850, appointed one of a committee to make and report a grade for Peach Street; and, if so, append to your testimony the proceedings of the Council appointing that committee?

Ans. I was appointed one of such committee, and the following is a copy of the proceedings of the Council upon that subject from the borough records, page 261, October 18th, 1850: "On motion of Mr. Skinner it was resolved, That a committee, consisting of Messrs. Carpenter, McSparren and Low, be and they are hereby appointed to make and report a grade for Peach Street." The committee did make and report a grade for Peach Street, and the following is a true extract from the borough record of the grade established for Peach Street from 12th to Buffalo Street, October 25, 1850, page 263 of borough record: "The following grade of Peach Street, reported by engineer Low, was unanimously adopted and ordered on file. Commencing at the south line of 12th St. 1.60-100 feet above the grade bench, at the crossing of Peach and 12th Sts., said bench being 94.82-100 feet above Lake Erie; thence to Penn Street 990 feet, elevation 12.21-100 feet, or 1.23-100 feet to 100 feet; thence 330 feet, elevation 8.20-100 feet, or 2.48-100 to 100 feet; thence 660 feet to the Buffalo Road, elevation 6.80-100 feet, or 1.3-100 feet to 100 feet, and ending 122.3-100 feet above Lake Erie."

C. McSPARREN.

Sworn and subscribed before us, June 20, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

A. Stone, Jr., produced by respondents, was sworn and testified as follows: I am 36 years of age, reside in Cleveland, Ohio, and am a railroad director and contractor.

Q. State whether you are acquainted with the crossing of Peach and Turnpike Streets in the city of Erie, and whether it crosses at or near grade.

Ans. I am acquainted with the crossing of the railroad, and know that it passes at or near grade.

Q. Is the railroad as constructed at that crossing an impediment, or obstruction to the free use of those streets as public highways?

Ans. The superstructure does not obstruct or impede the free use of the same as public highways.

Q. Are you acquainted with the crossing of the railroad over the Buffalo Road in Harborcreek?

Ans. I am.

Q. Would there not be more danger of collision of trains and injury to those travelling upon the Buffalo road, by making a curve in the railroad at Harbor Creek, so as to cross the same at right angles or nearly so?

A. There would be.

Cross-examination resumed.

Q. Do you state this as a general proposition, or as peculiarly applicable to Harbor Creek?

A. As a general proposition. The policy of eminent and experienced engineers, is to make railroads as straight as practicable.

A. STONE, JR.

Sworn and subscribed this 20th of June 1854.

JAMES SILL,
Examiner.

Alfred Kelly produced by respondents was sworn and testified as follows:

Q. (By complainants' counsel.) Are you a stockholder in the E. and N. E. Railroad?

A. I can hardly say whether I am or not. I authorized a person to buy stock for me, but it has not been transferred to my knowledge to me, nor has he drawn upon me for the same. If he should draw on me for it I should consider myself bound to pay for it.

Witness objected to by commonwealth's counsel as incompetent.

I reside in Columbus, Ohio, am 64 years of age. In the early part of my life I practised law, but for the last 30 years I have been engaged mostly in the construction of the public works of Ohio, and in the building and management of railroads.

Q. State whether you are acquainted with the crossing of Peach and Turnpike streets in the city of Erie, by the Erie & N. E. R. R., and whether it crosses at or near grade.

I am well acquainted with the crossing of those streets by the E. and N. E. R. R. The crossing is what is usually denominated crossing at grade, by which is meant that the surface of the road and the track at the point of crossing are on the same level.

Q. Is the railroad as constructed at that crossing an impediment or obstruction to the free use of those streets as public highways?

Ans. The railroad itself is no greater obstruction than must necessarily occur in all such cases. The slightest irregularities may be considered as in some degree an obstruction, but the obstruction is not such as to any appreciable extent interfere with the use of the streets.

Q. Are you acquainted with the crossing of the railroad over the Buffalo road in Harborcreek near Mills'?

Ans. I am, but not so intimately as with the crossing of the streets above named.

Q. Is the railroad at that crossing an impediment or obstruction to the free use of the Buffalo road?

Ans. To that I make the same answer that I made to the question regarding the crossing of the streets in the city of Erie.

Q. Have you for some time been concerned in the construction of railroads and travelling upon the same, and if so, state whether the railroad east of the crossing in Harborcreek, and between that and the Harborcreek station, passes nearer to the Buffalo road than is common in the construction of railroads in this and other States?

For the last five or six years I have been actively engaged, for the most part of the time in the location, construction, and management of railroads, and have travelled upon railroads in this and other States to a great extent, and frequently. I recollect numerous instances where railroads and public highways are located parallel to each other, and immediately adjacent for considerable distances, and where such proximity is not required by the peculiar formation of the country.

Q. Is the country through which that road runs, as level as that through which the E. and N. E. R. R. runs, for the a distance equal to that occupied by the latter, if not, for what distance is it level, at and near the point you have spoken of?

Ans. It is not as a whole. It is as level from the point where the travelled road approaches the railroad, from the north for ten miles south, as the Erie and North East Railroad.

Direct Examination resumed.

Q. Is the railroad at the crossing at Mills', in Harborcreek, an impediment, to the free use of the Buffalo road?

Ans. It is not.

Q. Have you for some time been concerned in the construction of railroads, and travelling upon the same, and if so, state whether the railroad east of the crossing in Harborcreek, and between that and the Harborcreek Station, in Harborcreek, passes nearer to the Buf-

falo road than is common in the construction of railroads through the country, in this and other States?

Ans. I have been engaged in the construction of roads for fifteen years, more or less of the time, and my business has been of such character as to require me to ride upon railroads a great deal, in twelve or fourteen different States, and have noticed locations as near and nearer than the one now spoken of, and in some cases not protected by a fence between the railroad and travelled road.

Q. Is it practicable to construct railroads through the country without crossing or running in the immediate proximity of public roads?

Ans. It is not.

Cross-examined by Complainants.

Q. State, if you please, what road you are a director of.

Ans. The Cleveland, Columbus, and Cincinnati Railroad, and Cleveland, and Painesville, and Ashtabula Railroad.

Q. Did you ever pass over the Buffalo road, in Harborcreek Township, since the railroad was built, except that portion of it occupied by the railroad?

Ans. I have several times passed between Erie and the Harborcreek station during the months of December and January last; it was during the time the railroad was obstructed. A portion of the time it was up at the crossing, and a portion of the time not.

Q. What amount or portion of your time, during the last two years, have you been in Erie, or have you merely been here casually on business?

Ans. During ten weeks subsequent to the 15th of November last, I was here about one fourth of my time, and occasionally both before and since that period.

Q. You speak of having seen places and known some where the railroad runs as near or nearer than it does in Harbor creek. Were *these* places on plains like the one in Harborcreek? If you know of any such places please name them.

Ans. I recollect one place between Philadelphia and Harrisburgh, I cannot say whether above or below Lancaster, the ground is undulating, but it is as practicable to go away from, as near the road; also a place on the Buffalo and Attica Railroad, now occupied by the Buffalo and New York City Railroad; also the New Haven, Hartford and Springfield Railroad runs within ten feet of a travelled road for one-eighth of a mile. It is separated from it by a fence. There are houses on the opposite side of the road. The case was entirely similar.

Q. What was the nature of the country on either end of the road you speak of on the New Haven, Hartford and Springfield Railroad, hilly or otherwise?

Ans. As level as that at Harborcreek.

Q. Is it practicable to construct railroads through the country,

without crossing or running in the immediate vicinity of public roads?

Ans. Where railroads are located through countries more or less densely populated and accommodated as usual, with public highways, or in which are the usual number of public highways, it is evidently impossible to locate railroads of any considerable length without crossing highways, and it is impossible to locate such railroads in direct lines, without running in places parallel or nearly so and contiguous to highways.

Q. Would there not be more danger of collision of trains, and injury to those travelling upon the Buffalo road, by making a curve in the railroad at Harborcreek, so as to cross the same at right angles or nearly so?

Ans. It would have required two curves, or what is frequently denominated a reserve curve, to have located the E. & N. E. R. R. at this crossing so as to have made it more nearly at right angles. These curves would necessarily have prevented persons passing along the road from seeing approaching trains at any considerable distance, and would have necessarily much increased the danger of collision between railroad trains and carriages passing along the highway, and at the same time added to the danger of the collision of trains passing along the railroad.

Cross-examined by Complainants.

Q. Do not trains of cars run upon railroads upon time and not upon observation of those conducting them?

Ans. Trains are intended to run upon time tables prepared for that purpose, but from accidental causes are frequently out of time, and the safety of running is much increased by making the road straight so that the engineer can see for a great distance, whether or not there is any obstruction on the road. Collisions between railroad trains and between trains and carriages upon public highways, much more frequently occur on a curved or crooked railroad than on a straight road. I should think that nine-tenths of all the collisions I have heard of occurrred on or near curves.

Q. Do you know of any distance as long as the E. & N. E. R. R. to be found on the Pennsylvania Central road between Pittsburgh and Harrisburgh as straight as the E. & N. E. R. R. would be with the reverse curve you speak of?

Ans. I do not know positively but I think there is none which result from the peculiar character of the two countries, through which the two roads pass.

Q. Is not the railroad north and south of this crossing at Harborcreek, generally level?

Ans. Its general character is that of a plain, sloping gently towards the lake, though frequently cut by ravines which increase in depth towards the lake. Of the distance of the railroad from the lake, I have no knowledge except from a general knowledge of the

course of the road and of the lake, I should think it from 1¼ to 1½ miles distant from the lake.

Q. You speak of railroads approaching and running parallel with public roads, in other places as near to each other as in Harborcreek without being the result of the formation of the country, state if you please if such proximity is not always inconvenient, troublesome and dangerous, to travellers and drovers along such road?

Ans. In many instances that I can recollect, such proximity is made necessary from the formation of the country. In many instances it is not, but such proximity results from a wish to have railroads and other highways as straight as practicable. I do not now recollect any instance in which any serious damage or inconvenience has resulted from such proximity, though I have sometimes seen horses passing along public highways in such places show so much restiveness as to make it necessary for drivers to hold them by the bridle or bit. It depends entirely upon how much they are used to railroads. I think such proximity is not always inconvenient, troublesome and dangerous to travellers. It depends almost entirely upon the nature of the animal driven. I have driven myself without any inconvenience in such places.

Q. Were you a director or owner of the Franklin Canal Company Road, and are you not a director or extensive stockholder of the Cleveland, Painesville and Ashtabula Railroad?

Ans. I have never owned directly but fifty dollars of the stock of the Franklin Canal Company's Road. I have an interest in the Franklin Canal Company's Road in consequence of my interest in the Cleveland, Painesville and Ashtabula Railroad, which company is a large owner of the stock of the Franklin Canal Company's road. I was formerly a director of both these companies but have not been since last summer or fall.

ALFRED KELLEY.

Sworn and subscribed this 20th of June, 1854, before

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 1½ P. M. Examiners was adjourned until 4 P. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 4 P. M. Examination was resumed, and Wilson Jones produced by respondents, was sworn, and testified as follows: I reside in Northeast, Erie County, Pa.; am 27 years of age, and am a laborer.

Q. State whether you are acquainted with the place where the

E. and N. E. R. R. crosses the Buffalo road in Harborcreek near Mills's.

Ans. I am.

Q. State whether during the last two years you have not frequently driven along the Buffalo road at that point crossing with a team, and if so, about how frequently?

Ans. I have frequently during the last two years, but during the last summer, I should think it would average twice a week, driving from Northeast to Erie as often as once a week and back. Sometimes during the winter, but not so frequently.

Q. State whether from this knowledge you believe the E. and N. E. R. R. at the crossing at Mills', obstructs or impedes the free use of the Buffalo road as a highway.

Ans. I think not.

Q. State whether in teaming you drew heavy loads.

Ans. I often came up to Erie empty, but in going down drew from 25 to 30 hundred.

Q. State whether with these loads you experienced any difficulty in crossing the railroad at this point.

Ans. I did not.

Cross-examined by Complainants.

Q. Who did you team for last summer?

Ans. Bester Town, of Northeast village.

Q. Are you teaming for him, or in whose employ are you this summer?

Ans. I am in Bester Town's employ. I am at work for him, not teaming so much this summer.

Q. Did you ever cross there when the cars were coming, and if so, have to wait until they got by?

Ans. I have crossed as they were coming along, but never had to wait. The last time I saw them coming, I drove over before they came up. They never happened to come along just as I was at the crossing, they have come by when I was drawing near, between there and Beyley's (Miller's.)

Direct Examination resumed.

Q. Is there any difficulty in seeing from the Buffalo road, as you approach the crossing, either from the east or west, the trains, so as to avoid coming in collision with them at the crossing?

Ans. I think not.

WILSON JONES.

Sworn and subscribed before us, June 20, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Richard O'Brien, produced by the respondents, was sworn and testified as follows: I reside in Erie; am 30 years of age, and am a clerk on the dock for Andrew Scott, in which employ I have been for the last five years.

Q. State whether your business on the dock has made you acquainted with the amount of tonnage, business done at the harbor of Erie during the last five years.

Ans. It has.

Q. State whether there has during the last five years, been an increase in the amount of business and tonnage at the harbor of Erie, and if an increase what that annual per cent. has been.

Ans. There has been an increase, and for the last four years the annual increase has been about 20 per cent. each year, to speak within bounds. I mean the increase including the tonnage in coal, lumber, and staves. I am confident of it. The amount of merchandise received has increased, also the amount of butter and other produce sent away has increased for the three last years. I cannot speak for the present year.

Q. State whether during the last five years there has been an annual increase in the shipping in Erie, the arrivals and departures?

Ans. There has been an increase in the arrival and departure of vessels.

Cross-examined by Complainants.

Q. Has there been an increase annually during the last three years in the arrivals and departures of vessels, if so, state whether the increase has been in steamboats or sail crafts?

Ans. There has been an increase, but it has been in sail vessels. There has been a decrease in steamboats.

Q. Has not the principal increase in sail craft been owing to the coal brought here by the canal, and the lumber brought here by the same means and by the plank roads?

Ans. The increase in sail craft is certainly owing to the amount of produce brought here to be shipped by the canal, coal, lumber, and staves, and wool, butter and cheese.

Q. Did you keep any account of the tonnage of vessels, so as to enable you to speak of the amount of the one, or the number of the other, or is your judgment based upon observation?

Ans. I did not keep an account of the number of vessels, but I have a correct account of the coal we have shipped (I mean Mr. Scott), and I know it has increased to the amount that I have spoken of. My judgment has not been based entirely on observation, but partly of course, also from the arrivals and departures. There has scarce been a vessel arrived that I have not seen.

Q. Do you know the number of vessels arriving or departing from the harbor of Erie annually, or the amount of tonnage and number of tons?

Answer. I could not answer that correctly, for I kept no account.

Q. Is not Mr. Scott one of the directors of the E. and N. E. R. R.?

Ans. I believe he is. I never asked him. I have heard it from others. He never told me.

Direct Examination resumed.

Q. You state in your cross-examination that there has been during the last 3 years, been a decrease in the arrival of steamboats at the harbor of Erie. State if you can what has occasioned this decrease.

Ans. I think it probably from the want of passengers to travel on the lake from here.

RICH'D O'BRIEN.

Sworn and subscribed before us, June 20, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Presly Arbuckle, produced by respondents, was sworn, and testified as follows: I reside in Erie; have been until recently a merchant, and am 49 years of age.

Q. State whether you are acquainted with the crossing of Peach and Turnpike Streets, by the Erie and Northeast Railroad.

Ans. I am.

Q. State, in your opinion, whether the railroad impedes or obstructs the free use of those streets as public highways.

Ans. The structure of the road does not.

Q. Are you acquainted with the crossing of Parade Street by the railroad, and state whether it is obstructed.

Ans. I am acquainted with the manner in which the railroad crosses Parade Street, and think it does not obstruct or impede the free use of the same.

Q. State whether, in the year 1850, you were a member of the town council of the (then) borough of Erie.

Ans. I was.

Q. State whether, in the month of March, 1850, you were appointed one of a committee to examine and report the propriety of letting the E. and N. E. R. R. Co. grade down French Street at the point where the railroad crosses said street, so as to let teams and carriages pass under the railroad.

Ans. I was.

Q. Did you act on such committee, and if so, what was done in pursuance thereof?

Ans. I did act on such committee. We conferred with the company through their engineer, Mr. Camp, and reported to the council.

Q. Was that action and report the same as testified to by Mr. McSparren?

Ans. It was.

Q. Please annex to your testimony a copy of your report, as made by the committee to the council?

Ans. It is as follows from the borough record, page 221, March 8th, 1860:—

"Mr. Dunlap, chairman of the committee appointed to examine the propriety of letting the railroad company grade French St., report that they think the street would be better to run under the railroad track than to run over it, and on motion it was resolved, that the same committee be authorized to make arrangements with the railroad company to grade said street at that place."

Q. Was that arrangement made by the committee with the railroad company, and did you as a member of the committee, attend to the carrying out the same in whole or part?

Ans. There was an arrangement made with the company through their engineer, Mr. Camp, to grade the street so as to allow the railroad to pass over it. The work progressed according to the arrangement which we were authorized to make with the company. I have no recollection as to whether it was completed before I left the council, or not.

Q. State if you recollect the height the bridge was to be (by the arrangement made) above the street?

Ans. I have no distinct recollection, but it is my impression and belief, that it was to be 10 feet in the clear.

Q. State if you please if upon the records of the borough, you find any other action with reference to the railroad crossing French St., and if so, please append a copy of the same to your testimony?

Ans. I do find the following on the borough record, page 274, December 20th, 1850:—

"On motion of P. Metcalf, it was resolved, that the supervisor be directed to stop up French St. where the railroad crosses it, and notify the company to repair, and put in good order said street, and if not done by the company, that the supervisor do it and present bill to the company."

Cross-examined by Complainants.

Q. Had not the work on the railroad commenced within the town previously to the time you were appointed on the committee you refer to, and was it not progressing at that time?

Ans. I could not answer, for I have no distinct recollection of the time when they commenced work in town.

Q. Had not the road been located in town, previously to your appointment, and action on such committee?

Ans. My opinion would be that it was; I have no distinct recollection.

P. ARBUCKLE.

Sworn and subscribed before us, June 20, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 7¼ the examiners adjourned until June 21st, at 1 P. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

June 21st, at 1½ P. M. examination proceeded, and Thomas Hassard being produced by respondents, was sworn, and testified as follows: I reside at Franklin Mills, Ohio, a civil engineer, and 34 years of age.

Q. State if you are acquainted with the character of the country from Erie to the New York State line, and the ground upon which the Erie and Northeast Railroad is located.

Ans. I am with almost all the ground.

Q. Are you acquainted with the line recommended by Mr. Camp in his testimony in this case, and if so, state from what source, or sources you derived that information?

Ans. I am acquainted with the line. The position of the line; the location of the line I learned from Mr. Camp's testimony. I have passed over the ground recommended by Mr. Camp. There *have* been no surveys, but all the further information I have obtained has been from the map; that is, the map of the E. and N. E. Railroad (now in their office), showing all the lines run upon the road. That line is traced upon that map. I have read the copy of Mr. Camp's testimony, as furnished from Mr. Walker's office.

Q. Would the road or line recommended by Mr. Camp be as good, in your opinion, and less or more objectionable in the crossing of the Buffalo road in Harborcreek, than the one adopted by the company?

Ans. I think the line would be more objectionable than the present location. It is making a crooked line for the railroad in place of the present straight line, and crossing the highway so that it would be more obstructed than on the present crossing.

Q. What is the length of the curve on the line recommended by Mr. Camp?

Ans. The length of the curvature would be about 8000 feet.

Q. From your experience in railroads, do you find fewer or more accidents occurring on a straight line than on curves; and if so, why?

Ans. I would consider more accidents would be liable to occur on a curved road than on a straight road, in collisions between trains, and running into vehicles or persons crossing the highway. This arises from the impossibility of an engineer seeing any obstacle that may be on the track until he is frequently too near to stop his train.

Q. State if large expenditures are not recommended by railroad companies to avoid curves in their roads when possible.'

Ans. It is generally recommended to go to much more expense in avoiding curves where it is practicable.

Q. State whether at the crossing of the Buffalo road by the railroad in Harborcreek, there is not a sufficient view to avoid all danger, unless from gross carelessness.

Ans. I have crossed it very frequently with horses and carriage, and never have found any trouble in seeing the trains both ways, so as to prevent being at the crossing at the time the train passes. I think the view is abundantly sufficient to avoid the danger of meeting the train.

Q. When the teams and trains are approaching the crossing in Harborcreek, going the same direction, either east or west, how far from the crossing can you see or hear the trains before approaching the crossing?

Ans. I should think coming from the east, I should say it would be nearly a mile; coming from the west, I should say about a third of a mile.

Q. When the teams and trains approach in opposite directions the crossings, how far from the crossing of the Buffalo road can you see or hear the trains approaching the crossing, either from the east or west?

Ans. I should say from six hundred to nine hundred feet each way, from the crossing, making them apart from twelve to eighteen hundred feet.

Q. Would it be practicable to build a railroad north of the Buffalo road from Erie to the New York State Line?

Ans. It would be, at a great expense. The expense probably would be double what the present road cost.

Q. Would or not on this route (north of the Buffalo road) the grade and curvature be materially increased?

Ans. I think they would both be very largely increased.

Q. Are you acquainted with the country from Erie to the 12 mile Creek, north of the Buffalo road; and if so, could a railroad be located, commencing north of the Buffalo road, near Jos. Y. Moorhead's, thence to the present crossing by the railroad of the 16 mile Creek?

Ans. I am acquainted with that country. I should think it would not be practicable, unless by using grade from 60 to 80 feet to the mile. It would be very crooked, and the cutting very expensive.

Q. Would the crossing of the Buffalo road by that route be less or more dangerous than the crossing of the Buffalo road in Harbor Creek at Mills' by the railroad?

Ans. The crossing would probably be in a deep excavation, so that if a bridge were built to carry the highway over the railroad, the line of the highway would necessarily be changed so as to cross nearly at right angles, or else the slopes cut down to the grade of

the railroad, which latter plan would make a very blind crossing that would be much more objectionable than the Harbor Creek crossing.

Q. You state that you are acquainted with the country from Erie to the 12 mile Creek, north of the Buffalo road; state whether it would be feasible to construct a railroad, commencing north of the Buffalo road, about one mile west from Jas. M. Moorhead's, and crossing that road, at or near the farm of William Scott, and running up the ravine there to intersect the Erie and Northeast road south of Jos. Y. Moorhead's, or at the 16 mile Creek.

(This question objected to by complainants, because too leading, and capable of being *being* answered by a negative or affirmative response.)

Ans. I should think that the route would be nearly impracticable, for there must be 60 or 80 feet rise there, within a distance of three-quarters of a mile, and I should think that before reaching the summit of the run that crosses the Buffalo road, near Scott's, that there would be a cut of 15 or 20 feet in depth, which might continue for about half a mile. The route would be circuitous, for the valley through which it runs is. Expense would be greater. The crossing of the Buffalo road would be more dangerous from the impossibility of seeing so great a distance as the present crossing.

Q. How long have you been acting as a civil engineer?

Ans. About 16 years, nearly all the time locating and constructing railroads exclusively.

Q. State if it is customary, in the location of railroads, for the rod men to keep level notes?

Ans. It is customary, for the purpose of avoiding errors, which sometimes occur from the leveller mistaking the readings of the rod.

Q. State whether in your business as civil engineer it has not made you acquainted with the location of railroads, in this and other States; and if so, whether it is or not impossible, in a country as densely settled as that along the line of the Erie and Northeast Railroad, to locate and construct a road without crossing public highways and running in as close proximity to them as the Erie and Northeast Railroad does to the Buffalo road in Harbor Creek t'p?

Ans. I have been acquainted with the location of roads in different States. It would be a very difficult matter to locate a railroad in so densely a populated country without interfering greatly with the highways, frequently running side by side for one and more miles, and crossing them at different angles, and in such a way as to require raising or cutting of highways. I know of a number of cases in other States where roads interfere in a similar manner with the highway as the northeast road does, by crossing and running side by side.

Q. Are you acquainted with the manner in which the E. and N. E. R. R. crosses Peach and Turnpike Streets, in the city of Erie?

Ans. I am.

Q. Does it cross those streets at or near grade?

Ans. It crosses them very nearly at grade.

Q. State whether or not the railroad, in crossing those streets, impedes or obstructs the free use of them as public highways.

Ans. I should think it did not.

Q. What would you say as to the crossing at Mills' in Harborcreek, does it obstruct or impede the free use of the road?

Ans. I should consider it but a very slight obstruction, no greater than an ordinary plank walk would be across the street.

Q. State whether the crossing of the E. & N. E. Road over Peach, Turnpike, and Parade sts. in Erie, and the Buffalo road at Mills' in Harborcreek, are not as good or better crossings than the crossings of the streets in Erie at the points of intersection with each other.

Ans. I think they are equally as good as the best street crossings in Erie, and far better than the majority of them.

Q. State whether in your opinion, the present location of the E. & N. E. R. R. could or not be improved by locating upon any other ground north or south of the same.

Ans. I have always considered that road as being very well located, and know of no change by which the location could be bettered.

Q. State, if you can, the elevation of the land east of the 12 mile creek, above the land west of the same between the Buffalo road and the lake.

Ans. I think it is from 50 to 60 feet higher.

Q. State the best way to overcome that elevation, in locating a railroad from Erie to a point east of the 12 mile creek.

Ans. The best way would be to begin as near Erie as possible and distribute the rise through as great a length of line as possible.

Q. To do that would it not be necessary at some point diagonally to cross the Buffalo road?

Ans. To obtain a good line for the railroad it would be necessary to cross the Buffalo road diagonally.

Cross-examined by Complainants.

Q. Did you ever survey or explore a line from the Borough of Erie to the New York State line north of the Buffalo road, with a view to the location and construction of a railroad; if not, how can you speak of the curvatures and grades on it? If you did so explore and survey it, when did you?

Ans. I never have surveyed such a line, but have frequently passed over a greater portion of that ground while engaged in making a survey of the Erie City road. I have never surveyed or explored with a view to the building of a railroad between the points. As to the curvature it would be from my knowledge of the ground. As to the grades, my knowledge is obtained from notes of the E. & N. E. R. R. surveys.

Q. Were you here at the time those surveys were made, or assisted in making them?

Ans. I was not. I came here, I think, two years ago to make surveys for the Erie City and Little Valley Railroads.

Q. Is the rise of 50 or 60 feet you speak of east of the 12 mile creek, confined to that side of the stream exclusively?—if not, describe how far west of it, it begins.

Ans. North of the Buffalo road the difference in elevation between the "2" banks is greater than on the south side. This difference is confined to that side of the stream, and continues nearly to the lake. South of the Buffalo road the banks approach nearer the same height, although the rise is still higher on the east side than on the west, though the difference is not so great as it is north of the road.

Q. Is not the country north and south of the Buffalo road, and west from the 12 mile creek to Erie, generally on a regular plain?

Ans. It does not vary much from it.

Q. Please state the general width of that plain north and south.

Ans. It would average probably one mile and a half in width. A greater distance to the south would bring the ground higher than the north.

Q. About what difference would there be on an average of three miles from the lake?

Ans. My answer would be guess work. It might make a difference of sixty or seventy feet in the general elevation.

Q. What is the distance of the location of the E. & N. E. R. R. from the lake generally to the 12 mile creek?

Ans. I should suppose not far from a mile or a mile and a quarter.

Q. Between the points spoken of, is not the country generally level, excepting the intervening ravines—that is, from the 12 mile creek to Erie?

Ans. I think that north of the Buffalo road, and between the 12 mile creek and Erie, it is not over 25 feet higher at the 12 mile creek than Erie, and generally level.

Q. How is it north of the railroad between the same points?

Ans. In the vicinity of the 12 mile creek, the Buffalo road and the railroad occupy higher ground than the 25 feet, and that would generally continue on towards Erie. I should presume that it is about 40 feet higher than it is north of the road, and 65 feet above Erie. There is an upper and a lower table near Jos. Y. Moorehead's, and the Buffalo road is near the edge of the upper table.

Q. Have you examined and levelled to ascertain their elevations at the point spoken of?

Ans. I have not.

Q. How far south of the Buffalo road as far west as opposite James Moorhead's, is the E. and N. E. R. R. located?

Ans. I can scarcely even guess at that, for I have not been through.

Q. Have you been through between the railroad and Buffalo road so as to survey or explore the same for a railroad between Scott's and the 12 mile creek?

Ans. I have not explored any railroad route there. I have been through the most of it several times, I could not say the difference.

Q. Has not the route you are exploring and surveying for the Erie City road, a more southern direction from the 6 mile creek or thereabouts than the E. and N. E. road and how much?

Ans. It has. The distance going eastward would vary from one-half to four miles.

Q. Has not your surveys been almost exclusively, if not entirely so, south of the E. and N. E. road, in making your surveys for this company?

Ans. They have been.

Q. The nearer the railroad could be made to the lake, the less it would interfere with roads and improvements would it not?

Ans. It would interfere less.

Q. Does it at all prevent the construction of railroads that they cannot be made upon straight lines and cannot cross public roads by direct approaches, and do you know any equal distance or any road leading east through Pennsylvania or New York, that would be straighter than the line proposed by Mr. Camp, for the E. and N. E. road?

Ans. It does not prevent the construction of railroads, I think I do not know of any so crooked as that would be.

Q. Please give us the extent of the curves proposed by Mr. Camp, and what distance would be occupied in making them?

Ans. He proposes three curves in the aggregate of 40 degrees. The radius he proposes to use being 11,460 feet, or what is called a half degree curve, would require a length of 8000 feet, being a little over a mile and one-half.

Q. Do you derive this from Mr. Camp's testimony, if so, did you hear it given, or did you read it as certified to by the commissioners?

Ans. I derived this from an inspection of the map, not from Mr. Camp's testimony.

Q. Was the map made by Mr. Camp to your own knowledge?

Ans. I have no personal knowledge of the maker of the map.

Q. You say that when the cars and carriages are approaching the crossing from the same direction, they can mutually see each other for near a mile on one side, and on the other side for a third of a mile. If you were in a close carriage, and in advance of the cars riding, how far could you see or hear them?

Ans. You might not see them until you got close to the crossing, unless you looked out for them. I think that at a number of places persons on a train might see a carriage on the road.

Q. If after night a carriage is passing in advance, as spoken of in the last question, would there not be greater danger of a collision on some part of this crossing?

Ans. I think the driver would be more apt to see the train at night than in the daytime, on account of the lights.

Q. If he was in a close carriage and did not see the light, would

the conductor or engineer on the train be as likely to see the carriage as in the daytime, and would there not be danger in such case at this crossing at night?

Ans. The engineer of the trains would not be so likely to see him as by day, and there would be danger unless the watchman was at his post. I believe they now keep a watchman at this crossing.

Q. Coming from the east on the Buffalo road, is not the view of the railroad west of, and up to the crossing, at the west end of it, intercepted by a house and orchard, until within a very short distance of the railroad track?

Ans. The view is obstructed a little by some trees. The house stands east of the trees. I should judge it did not obstruct the view. The trees do.

Q. How far is the house from the railroad track, and at about what angle does the railroad strike the Buffalo road at the west end of the crossing?

Ans. I think the house might be 30 or 40 feet from the track. The angle of the crossing I should judge to be about 10 degrees.

Q. Do you state that the house is not, at any time, between you and a view of the railroad, looking west from the Buffalo road?

Ans. It is my impression that the trees are the first obstruction. I think the house is back of the trees. The trees appear to be nearer the track than the house. The house is, of course, between you and the railroad. You could not see the Six-mile creek bridge on account of the house. I don't know how far the bridge is from the house, it is some distance. It may be 1200 feet or more.

Q. Have you been on the ground with the view to see and speak of the approaches, or only speak of it from passing occasionally?

Ans. I have been upon the ground for the purpose of viewing the approach to the crossing.

Q. When?

Ans. Yesterday.

Q. In going east are there not trees and obstructions to prevent you seeing the approach of cars until very near the crossing place, and how near?

Ans. There are trees and fences on the south side which might prevent you seeing a train until within a distance of five or six hundred feet of the crossing. I should judge that you could not from the top of the hill see the cars unless they were crossing, and then it would be impossible for you to drive to the crossing until they had passed.

Q. How far is the top of the hill from the crossing?

Ans. I cannot say.

Q. Can you see the cars half the distance from the top of the hill?

Ans. Only when they are at the crossing and a little distance east of the crossing.

Q. How many feet or rods east of the crossing can you see them when half way from the top of the hill?

Ans. Perhaps two or three hundred feet.

Q. How long since the road has been planked over at that place?

Ans. I cannot state definitely, but I suppose since March or April.

Q. When you speak of the crossings of the road in Harborcreek being better than the crossings of the streets in Erie, with a view to show, in your opinion, that it is no obstruction to either, do you mean that the structure of the road is not an interruption, or that neither the structure and use are an obstruction?

Ans. I speak of the construction of the road merely.

Q. You say that you know of places in which roads run as near to public roads for a mile or more as it does to the road in Harborcreek. Please state where these places are, and if it not the result of the topography of the route.

Ans. The first that I think of is on the Buffalo and Attica Road near the Aurora Plank Road. There the topography of the *the* country is very similar to Harborcreek. The next I think of is at Windsor Locks, Conn. That and other places is the result principally of the topography of the country.

Q. When you speak of the road do you not refer to that part of it on which the railroad is directly constructed, and alongside of which is an approximate road made by the company near Gilbert and Plara Elliott's?

Answer. I refer to the whole road where it approaches from the 6 mile creek to Besley's or the Harborcreek Station.

Q. Is not a part of the Buffalo road between these points occupied by the railroad, and directly alongside of that? Is not this the place of the nearest approach to the common road, and was not this road built by the company?

Ans. I have been told that a part of the Buffalo road is occupied by the railroad, and it is along that part of the railroad which approaches nearest to the common road. I do not know whether it was built by the company or not. It was all finished when I came here.

Q. You say you are in the employ of the Erie City Railroad, State who are the President and Directors of that road. State if they are not mostly the same as in the Erie and Northeast Road, and what the difference is.

(Respondents objects to this question on the ground that it is not cross-examination.)

Ans. Milton Courtright is President, Chas. M. Reed, P. Metcalf, J. H. Walker, John A. Tracy, J. C. Spencer, are Directors. The others, to the number of 13 in all, I do not recollect. The gentlemen I have named have been Directors of the E. & N. E. R. R., excepting Mr. Spencer, who is Secretary of the E. & N. E. R. Road. I cannot say as to how it is at present.

THOS. HASSARD.

Sworn and subscribed this 21st day of June.

JAMES SILL,
GEO. H. CUTLER,
Examiners.

At 6½ the examiners adjourned until Thursday, June 22d, at 9 A. M.

JAMES SILL,
GEO. H. CUTLER,
Examiners.

At 9 A. M., June 22d, examination resumed, and Timothy Drake, produced by respondents, was sworn, and testified as follows: I reside in Hartford, Conn. Am 34 years of age, and a civil engineer, which business I have been engaged in nearly all the time for 11 years, and in the location and construction of railroads exclusively.

Q. State whether you are acquainted with the line of the E. & N. E. R. R.; and if so, when and how you became so acquainted.

Ans. I am acquainted. I passed over nearly the whole line several times on foot within the last six months, and rode over it a number of times. The first time I passed over it on foot was in last October.

Q. State whether you are acquainted with the country north and south of the E. & N. E. R. R. between Erie and New York State Line; and if so, how you became so acquainted.

Ans. I am acquainted with the country. I have had occasion to pass over the country several times in making surveys for the Erie City Road. I have had occasion to pass over the country on foot several times, and also with a horse and carriage.

Q. State the character of the country north and south of the E. & N. E. R. R., between Erie and the 12 mile creek, and the same from 12 mile creek to the New York State Line, and what, if any, is the difference in elevation if any between the country east and west of that creek.

Ans. As to general character of the country between Erie and the 12 mile creek, north of the Erie and Northeast Road, the ground, after sloping off from the first table down to the next table and from thence to the lake, is a regular slope, probably sloping 40 or 50 feet to the mile, I should judge. South of the Erie and Northeast Road the country alternates with broad valleys and small ridges, generally running in an easterly and westerly direction and sloping towards the lake, generally at the rate of from 50 to 100 feet to the mile. East of the 12 mile creek, there is broad table land or ridge running down to the lake, with a very gradual slope to the lake, probably not over 20 feet to the mile, this description refers to the land north of the E. & N. E. R. R. South of the E. & N. E. R. R., and between the 12 mile creek and the 16 mile creek, the country partakes of the same nature as that west of the 12 mile creek, and south of the E. & N. E. R. The table land west of the 12 mile creek and north

of the Buffalo road is probably about 20 feet above Erie. East of the 12 mile creek and north of the Buffalo road the ground is about 60 feet higher than on the west side from the Buffalo road to the lake. South of the Buffalo road and up to the railroad the difference between the two banks is not so great as it is north of the Buffalo road. The difference would, probably, not vary much from 20 feet. South of the E. & N. E. R. the two banks approach nearer to the same level as the two banks go south towards the ridge.

Q. State whether the gulfs over which the E. & N. E. Road passes, do or not run north and south, and whether they increase in width and depth as they approach the lake.

Ans. They run nearly in a northerly direction, their general course is such. They increase in width and depth as they approach the lake.

Q. State if you know the width of the Six-mile creek, sixty rods north of where the E. & N. E. R. crosses the same, and if so whether it is not wider and deeper than at the railroad crossing.

Ans. I don't know the exact width of the valley there at that point, but I think it to be about 200 feet wider than at the present crossing and very little deeper.

Q. State if you are acquainted with the line recommended by Mr. Camp, in his testimony in this case, and if so, from what source you derived that information.

Ans. I am acquainted with the line recommended by Mr. Camp; having passed over the ground for the purpose of making an examination of it, and also having seen the map which contains all the lines surveyed for the E. & N. E. Road, and on which this line is drawn as proposed. I have also read his testimony from a copy furnished from Mr. Walker's office. Mr. Walker and Mr. Wetmore were present on one occasion when I read it. I read it some three times.

Q. Would the line recommended by Mr. Camp be, in your opinion, as good, or less or more objectionable, in the crossing of the Buffalo road, than the one adopted by the company?

Ans. I think his line would not be as good as the one adopted by the company, because it would cross the Buffalo road on a curve, so that the cars could not be seen as far as they can on the present straight line. There would also be, as a matter of course, greater danger of collision of trains than on straight lines. The length of the lines would be increased, and the expense also. So far as the cutting of farms is concerned, I think there would be very little difference.

Q. From your experience on railroads, state whether there are more or fewer accidents occurring on straight lines than on curves, whether on crossings or not.

Ans. In my experience I have known more accidents to occur on curves than on straight lines. At crossings I have known many accidents to occur on sharp curves, both to trains and vehicles pass-

ing. My experience is that there are more accidents on curved than on straight lines. Also more accidents occur on curves away from crossings than on straight lines. Trains are also more apt to be thrown off the track on curves than on straight lines.

Q. What is the length of curve on the line recommended by Mr. Camp, how many curves does he recommend, and could the same be located within the points he designates?

Ans. The length of curves would be about 8000 feet—three of them. The first curve west of the Six-mile Creek would be practicable. The two curves east of the Six-mile Creek, between that and Harborcreek station, would be impracticable, with such radius as the one proposed by Mr. Camp.

Q. State whether, at the crossing in Harborcreek at Mills', there is not sufficient view to avoid danger from collision of trains, or coming into contact with persons or vehicles travelling upon the Buffalo road, unless from carelessness.

Ans. I think there is sufficient view to avoid all accidents by using proper care and prudence and taking heed of the signals of the watchman.

Q. When the trains and teams approach the crossing at Harborcreek going either east or west, state how far from the crossing the train can be seen by those approaching the crossing in the same direction upon the Buffalo road?

Ans. In coming from the Harborcreek station west, the cars can be seen at all points, unless houses or streets intervene. There is nothing to obstruct the view coming west from Besley's except the school-house and a few trees for about three-quarters of a mile. In going from the west to the east (the train and traveller going in the same direction), the cars can generally be seen at all points for at least half a mile west of the crossing.

Q. When the teams and trains approach (in an opposite direction) this crossing, how far can the trains be seen by one travelling on the Buffalo road, east or west of the point of crossing?

Ans. I think they can be seen for 40 or 50 rods each way from the crossing. That would make the train and team from 80 to 100 rods apart. As the traveller approaches nearly on to the crossing, say 10 feet from the line of the track, he could see the train for a mile either way if he looked for it.

Q. State whether at this crossing at or near Mills' the E. & N. E. R. R. impedes or obstructs the free use of the Buffalo road as a public highway?

Ans. The superstruction of the road does not impede or obstruct the use of the road any more than the ordinary crosswalks would in a town or city.

Q. Would it be practicable to build a railroad north of the Buffalo road, from Erie to the New York State line, and if practicable would it have been judicious for the E. & N. E. company, so to have located their road? If objectionable, state some of the objections.

Ans. It would be practicable to build a road on that route, but it would not be a wise location, or one which any experienced or skillful engineer would have located upon, when he could have found the present direct line, as adopted by the Co. The route north of the Buffalo road would be objectionable for three reasons. First, it would have much more curvature than the present line. Second, the grades would be steeper. Third, the cost of construction would be increased at least one half.

Q. Could a railroad be located and constructed, commencing north of the Buffalo road near Joseph Y. Moorhead's thence to the present crossing of the 16 mile creek by the railroad, if it could, state the objections, if any there are, to the same, how it would cross the Buffalo road, and its expense, curvature and cutting, compared with the present road?

Ans. A railroad could be constructed on that line. There would be no curvature. It would be more expensive and have steeper grades. Probably it would be necessary to use grades of 60 or 70 feet to the mile, as there would be an elevation of 60 feet to overcome in about three fourth of a mile. The crossing of the Buffalo road would probably be on a curve, and would be more objectionable than the present crossing at Harborcreek. As to the cutting, I could not state particularly but the road would be a more dangerous one to operate, because of having steeper grades, and more curvature, and greater liability to accidents to trains.

Q. Could a railroad be located and constructed commencing north of the Buffalo road and a mile or so west of James M. Moorehead's, thence to the present crossing of the 16 mile creek by the railroad or west thereof? If it could be, state the objections, if any to the same, how it would cross the Buffalo road, its probable curvature, grade and expense as compared with the present road.

Ans. I think a road could be constructed on that line, but it would be objectionable on account of its greater curvature, steeper grades, greater length of line and the increased expense over the present line. The crossing of the Buffalo road would be on a curve, and more objectionable than the present crossing at Harborcreek.

Q. Is it customary for the rodman to keep level notes, and do they correspond with the notes of the leveller?

Ans. It is customary for the rodmen to keep notes, for the purpose of keeping a check upon the leveller, and testing the correctness of the level notes, and if the books of the two correspond they are assumed to be correct. It is also customary to run what is called test levels, and if these levels agree with the former levels the work is placed beyond any doubt as to its correctness.

Q. State whether you have ever known in a level country the line of a railroad to be curved to avoid a public road, and whether in such cases the public roads are not adapted to the railroad after it is built, if any change is required, and whether or not the crossing at Harborcreek could not be avoided if desired, by continuing the

Buffalo road to the north of the railroad from near Mills' west to Six mile creek, and crossing under the railroad bridge in the low land west of that creek?

Ans. I have never known a line of railroad to be changed in a level country for the purpose of avoiding a public road. I have known many public roads to be changed, and new roads built for the purpose of adapting them to railroads. The Buffalo road could be continued from near Mills' on west and north of the railroad, crossing the 6 mile creek and passing under the 6 mile creek railroad bridge, unite with the Buffalo road, west of the creek. The distance would be about 2500 feet or half a mile.

Q. State whether you know how the Buffalo road runs near the Elliotts' in Harborcreek, and how often at that point the Northeast road crosses the same.

Ans. I know only from the map of the original surveys of the E. & N. E. E. R., not having been upon the ground until the railroad was completed, According to that map the railroad crosses the Buffalo road three times between Besley's and the Six-mile creek.

Q. State, if you know, how these, or either of these, crossings are avoided.

Ans. There is now but one crossing of the Buffalo road, and that is near Mills'. The Buffalo road continues from near Mills' eastwardly to near Besley's north of the railroad. I suppose the crossings to have been avoided by the building of a new road.

Q. State whether the new road is straighter than the old road as laid down upon the map.

A. The new road is straighter and shorter than the old road as laid down upon the map.

Q. From your general knowledge of the country between Erie and the New York State line, could or not, in your opinion, the location of the Erie and Northeast Railroad be improved?

Ans. Starting from the same point, and running to the same point, I know of no way in which it could be improved either in grade or alinement.

Q. Starting from *any* point of the city of Erie, could or not the location of the E. & N. E. R. R. be improved?

Ans. I think it could not be materially improved.

Q. Are you acquainted with the crossing of Peach, Turnpike and Parade Streets, in the city of Erie, by the E. & N. E. R. R., if so, are they crossed at or near grade?

Ans. I am acquainted with the crossings of those streets. I have taken the level on all those streets. They are crossed nearly at grade, that is of the original surface of the ground.

Q. State whether, in your opinion, the crossing of these streets by the railroad impedes or obstructs the free use of them as public highways.

Ans. I think it does not any more than an ordinary cross walk

would in the streets of a town. The crossing cannot be improved; it is as good as it can be made now.

Q. State whether you have taken the level to ascertain how the railroad crosses Ash Lane, German and Holland Streets, and whether it crosses the same at or near grade.

Ans. I have taken the level upon these streets; the railroad crosses them within a few feet of grade. These streets are not all of them graded at the present crossings of the railroad. I think they are not any of them. If worked and graded they would be crossed very nearly at grade, all of them, so as to give very feasible crossings.

Q. State whether there would be any difference between German and Holland Streets when improved, and Parade as improved.

Ans. I think there would be very little difference, for when improved they could be readily passed without any difficulty.

At 12 M. the examination was adjourned until 2 P. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 2 P. M. the examiners met, and Mr. Drake being again on the stand was cross-examined by complainants.

Q. In what capacity and in whose employ are you at this time, and how long have you been so employed?

Ans. I am employed as a resident engineer of the Erie City Railroad by the chief engineer, Thomas Hassard. I have been employed since the first of last October, and have given a part of my time to the Erie City Road, and a part to the Erie and New York City Railroad, in the State of New York, the two lines being generally known under the name of the Erie and Little Valley Railroad, and been on the Meadville branch of the Pittsburg and Erie Railroad about three weeks this spring.

Q. Did you ever, as chief engineer, locate and superintend the construction of any railroad; if so, where was it?

Ans. I never have, as chief engineer of any road.

Q. What is the difference, in general surface, between the location of a railroad at and near Erie and 60 rods north of it?

Ans. I could not state it exactly. I should judge it to be from 10 to 20 feet difference in the general surface of the country, sloping to the lake.

Q. How far does that character of country extend east from Erie between the railroad and the lake?

Ans. I should not think it extended more than a mile or a mile and a half. The farther east you go to the 12 mile creek the slope is more gradual to the lake than it is at this point.

Q. Did you ever pass over the entire length of country on foot between Erie and the State line north of the Buffalo Road? If so, state when and for what purpose.

Ans. I have never passed over the whole of it directly on foot at the same time. I been over nearly the whole of it on foot at different times within the last six months, for the purpose partly of examining the proposed lines of the E. & N. E. Road. I went over it last Tuesday for the express purpose of examining these proposed lines, partly on foot and partly in a carriage, as far as Moorheadville. Last week I passed over considerable country north of the Buffalo road, both east and west of Northeast, and between there and the lake. I rode out and walked out, with no particular object in view, only to look at the country.

Q. How long were you absent when you went to explore the country between this and Moorheadville on Tuesday last; what instruments did you use to ascertain heights and levels, and who assisted you?

Ans. Five hours. I had no instruments with me. Had no one to assist me, but was in company with Mr. Hassard and Mr. Reed. But I had previously looked the country over (during the last week), most of it between here and about two miles east of the Harborcreek station.

Q. Did you go farther east than Moorheadville at the time you speak of above, and what distance is that from Erie?

Ans. I did not go beyond that on Tuesday of this week; the distance is about 11 miles from Erie.

Q. You spoke of your acquaintance with the country north of the E. & N. E. R. R., because you had examined it in surveying routes for the Erie City Railroad. To what extent, if any, does the route or the proposed route of that road run north of the E. & N. R. R. from Erie?

Ans. I stated that I became acquainted with the country north of the E. & N. E. R. R. in pursuing my legitimate business in surveying for the Erie City Road. The Erie City Railroad does not any of it run north of the E. & N. E. R. R. east of the city line.

Q. Was it ever proposed to locate the Erie City Road or any portion of it north of the E. & N. E. Road? If so, for what distance east?

Ans. I am not aware that it was ever intended to locate any portion of the road (east of the city limits) north of the Northeast Railroad.

Q. Did you ever survey or level the country north of the Buffalo Road and east of the 12 mile creek, or explore the same with a view to the location of a railroad? If so, state when and who were your assistants.

Ans. I never have.

Q. You have given the elevation and construction of the country south of the Buffalo Road to the railroad near and west of the 12 mile creek. When did you make this exploration; for what purpose and what instruments were used?

Ans. I made the explorations several times within the last 6

months when I have had occasion to go over the country. I became acquainted with the country in this way. I never made any survey of the country north of the Northeast Railroad with instruments.

Q. Were any of these occasions spoken of in your last answer while surveying or exploring for a railroad route?

Ans. They were when I was going from place to place for the purpose of exploring and surveying for the Erie City Railroad. I frequently went up and down the Buffalo Road, and passed from the Buffalo Road south on roads leading south to the line of the Erie City Road.

Q. How far was the line of the Erie City Road (near the 12 mile creek) south of the line of the Erie and N. E. Road?

Ans. Probably between 2 or 3 miles. I could not state exactly; that is the located line.

Q. What curve or curves are there in the Erie and Northeast Road, and where do they occur?

Ans. There are only two curves, according to my recollection, in the Erie and Northeast Railroad; and one occurs to the eastward of the 20 mile creek, and the other to the westward. These curves are very slight, with a radius of not less than 11,460 feet. This is a very light curve; it is what is called a 30 minute curve. I would not state positively what the character of those curves is, but I judge them to be as I have stated.

Q. Did you at any time survey and accurately calculate the curves proposed by Mr. Camp east of 6 mile creek?

Ans. I have never surveyed them, but I have calculated them sufficiently from the map of the Erie and N. E. Railroad so as to say that they are impracticable, as Mr. Camp proposes.

Q. In what particular are they so impracticable?

Ans. Not length of tangents sufficient between the two vertexes to get in the curve.

Q. State how many feet it falls short of it?

Ans. To make the reverse direct, without any tangents between the curves, it wants about 800 feet.

Q. To make these curves with this distance, short of the length of radius proposed by Mr. Camp, would not the curve still be of a very slight nature; and state, if you can, what degree curve it would be?

Ans. The curves would be light curves, probably from 45 to 50 minute curves, with a radius of between 800 and 900 feet.

Q. Do you know the country north and south of where Mr. Camp's proposed line would pass the Buffalo Road? State if it is not level on both sides.

Ans. I am acquainted with the country there, but it is not level on both sides. There is a valley which is generally called the valley of Harborcreek. The width of that valley I would judge to be 800 to 1000 in length on his proposed line, and from 6 to 8 feet

lower than the general surface of the country in that vicinity. I judge of the height and distance from examination with the eye.

Q. In approaching the crossing on Mr. Camp's line with a railroad an embankment or bridge would be necessary over the valley or depression you speak of; and, if made or constructed, would not then the railroad cross the Buffalo Road being nearly level north and south of it for a mile or more on either side?

Ans. It would have the general slope towards the lake which is characteristic of the country in that vicinity.

Q. Would a railroad made on this line cross the Buffalo road more than once; and if so, would not that be nearer at right angles than at Mills'?

Ans. It would cross the Buffalo road but once, but as to the angle it would not be much different from that at Mills'. It would probably be a few degrees more than the angle of crossing at Mills'.

Q. You speak of a road beginning north of Moorhead's to continue to the present crossing at the 16 mile creek, and say that it could be constructed, but that there would be more curves and steeper grades than the present line. State, if you know from actual running of the line, what the grades would be, or the amount of curvature, and where you propose to begin that line.

Ans. I do not know from actual survey what the grades would be, or the degree of curvature. But I know that that line would be about half a mile south of the present road at the point near Moorhead's, and in order to unite two tangents running nearly in the same direction, about half a mile apart, there must necessarily be considerable curvature.

Q. What is the length of the crossing of the track at Mills'? State the angle if you can.

Ans. I should judge it to be from 600 to 800 feet between the cattle guards. I never measured it. The angle of crossing I should judge to be about eight or ten degrees.

Q. When you speak of the crossing, there being no obstruction to the free use of the road, do you mean the superstructure of the road merely?

Ans. I stated that I did not think the superstructure of the road would impede the crossing of the Buffalo road near Mills' any more than a common crossing or crosswalk in a town or city. I meant to speak of the superstructure and the working of the road. I stated that I thought there was no need of accidents happening, with care and prudence, and taking heed to the signals of the watchman.

Q. How wide is the Buffalo road at that point, and are there no fences on either side of it?

Ans. I should judge the road to be about 4 rods wide, and fences on both sides of it.

Q. Where the track passes along nearest the centre of the Buffalo road, at the crossing at Mills', it leaves on each side less than 30 feet. Would you not consider it a dangerous place to be passing

with a team or teams when a train of cars were passing along, and still more so to droves of cattle?

Ans. I would not consider it dangerous to teams that were well broken. If the signal of the watchmen were heeded they would not be there at the times the trains were passing. As to droves of cattle, the engineer being on a straight line could see a drove of cattle stringing over the track, and it would be gross carelessness and recklessness for him to run his train through them at full speed, and it would jeopardize the lives of the passengers in the train.

Q. If the traveller is obliged to observe the signal of the watchman and stop and wait till the cars pass over the road at this point, would you not consider it an obstruction to the free use of the road?

Ans. I would consider it a slight obstruction for the time being. The train would not be on the road for more than a quarter of a minute.

Q. Do you mean to say that the traveller would only be detained while the cars would be crossing the 800 feet, or would they not be detained before the arrival of the cars at the point of crossing. Would any traveller venture to cross seeing the cars at the point of contact on the road?

Ans. The traveller might be detained for a minute perhaps. It would depend upon how well broke his team was. Whether any traveller would risk crossing immediately before the passage of the train, I don't know. I have seen them drive up and cross over immediately after the passage of the train.

Q. Do you know the grade of Ash Lane, German or Holland Streets, as established by the corporate authorities of the city of Erie, and if so, how did you acquire your knowledge?

Ans. I don't know as there has been any grades established by the authorities of Erie, or that there has not been. I have no information on that subject.

Q. Have you any knowledge of the grade established by the city on any of the streets crossed by the railroad in the city of Erie at the point of crossing?

Ans. I have no knowledge of any action by the authorities on that subject.

Re-examined by the Respondents.

Q. State the source or sources whence you derived your information, upon which you have testified, as to the make of the country north and south of the E. and N. E. R. R., whether it is derived only from travelling over the same, or from that and surveys made by you for the Erie City Railroad, and from examinations of the lines, levels, and maps of the E. and N. E. R. R., as on file in their office.

(This question objected to by complainants, on the ground that it is leading, and also because it is re-examining on a subject already gone into by the witness on the part of the respondents.)

Ans. I derived my information from a correct knowledge obtained in making surveys for the Erie City Railroad, and from having frequently gone over the country and explored it in various directions, south of the E. and N. E. R. R. My information in regard to the country north of the E. and N. E. R. R. from having frequently passed over it on foot, and in a carriage over the Buffalo road, and from the inspection of the maps, profiles and level books of the original surveys of the E. and N. E. R. R. now on file in the office of the E. and N. E. R. R. Co.

Cross-examination resumed by Complainants.

Q. How much of the country east of Erie and north of the E. and N. E. R. R. have you examined, excepting in your passage along the public roads through it? State the length of time so engaged, other than on the public road.

Ans. I have stated before that I often passed over the country and become acquainted with it within the last six months, varying in width from one-half to a quarter of a mile north of the Buffalo road, from Erie to the 12 mile creek. East of the 12 mile creek, I have on several occasions passed over the ground clear down to the lake. It was not while I was on the public roads, I was often out in the lots. I can form no definite idea of the time spent only that I have been over it sufficient to get a correct knowledge of the country, and its general topographical features.

Q. What was the necessity of examining maps and drafts if you say you acquired a sufficient knowledge from your own examination of the country?

Ans. I stated that I acquired a correct general topographical knowledge of the country from my own examinations. In order to give definite heights and elevations, it was necessary that I should refer to the former surveys, or make them myself.

Q. How long is it since you knew that you would be called on to speak on oath as to the topography and suitableness of the section of country for a railroad?

Ans. It was on the 6 of June that I was first notified of that.

TIMOTHY DRAKE.

Sworn and subscribed before us.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 6½ P. M., the Examiners adjourned until June 23d at 9 A. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 9½, Examination resumed, and S. P. Kepler, produced by respondents, was sworn and testified as follows: I reside in Erie; am 35 years of age, and a founder and merchant.

Q. Are you acquainted with the manner in which the E. and N. E. R. R. crosses Peach street, Turnpike and Parade streets in the city of Erie, and if so, does it cross at or near grade?

A. Peach and Turnpike streets are crossed at the grade of street, but as to Parade street I am unable to say.

Q. Does the railroad at these crossings, or either of them, impede or obstruct the free use of said streets as public highways?

Ans. As the track is laid on Peach and Turnpike streets I should not think it much more of an obstruction than ordinary crossings of the streets, some of them. I am not able to say as to Parade street. I don't know as I have been over it for two years.

Cross-examined by Complainants.

Q. Does not the railroad and its use impede and obstruct the use of Peach and Turnpike streets as public highways?

Ans. When the cars and locomotive are upon it I suppose it does.

Q. Do you know the grade of Peach and Turnpike streets established by the corporate authorities of Erie at the point of crossing of the railroad, if so, how do you know it?

Ans. I do not.

S. P. KEPLER.

Sworn and subscribed before us, June 23, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

William S. Lane, produced by respondents, was sworn and testified as follows: I reside in Erie, am 32 years of age past, and by profession a lawyer.

Q. Are you acquainted with the manner in which the E. and N. E. R. R. crosses Peach, Turnpike and Parade streets in the city of Erie? If so, state whether it crosses them at or near grade.

Ans. I am acquainted with the manner in which the railroad crosses those streets. It crosses Peach and Turnpike at grade. Parade street at about grade.

Q. Does the railroad at these crossings, or either of them, impede or obstruct the free use of them as public highways?

Ans. The railroad, as constructed across either of those streets, does not either impede or obstruct them, and I might add, the running of trains across those streets at the particular moment of crossing necessarily impedes the crossing as it must at the crossing of any highway.

Q. Are you acquainted with the manner in which the E. and N. E. R. R. crosses Ash Lane, German and Holland sts. in the city of Erie? Are those sts. improved or worked at the point of crossing, if so improved, would not the crossings be similar and of as easy passage as that of Parade street?

Ans. I am acquainted with the crossings of those streets, and when last at those crossings (except when crossing on the railroad), which, perhaps, was two months since, the crossings were not improved as the other streets were, but from the nature of the ground and the crossing, there is nothing to prevent as favorable a crossing as that of Parade street.

Q. Could not the grade of those streets at the point of crossing be accommodated to the railroad as located, without injury to the adjoining lots or those streets?

Ans. That could be done I have no doubt at all.

Q. Are you acquainted with the manner in which the railroad crosses the Buffalo road in Harbor Creek at Mills'? If so, state whether it is crossed at or near grade.

Ans. I am acquainted with the manner in which the railroad is constructed at that point, and it crosses the Buffalo road at grade.

Q. Does the railroad at that crossing impede or obstruct the free use of the Buffalo road as a public highway?

Ans. The railroad crosses the Buffalo road at that place obtusely or angling, and in itself is no obstruction to the free passage of the highway, being at grade, or the top of the rails level with the top of the road, and planked.

Q. State whether there is from the Buffalo road and from the locomotive an unobstructed view each way sufficient to prevent injuries at the point of crossing, unless from carelessness on the part of those travelling on the Buffalo road.

Ans. My recollection is that there is a sufficient view each way to prevent accidents to those travelling the road except from carelessness as stated, because the railroad is straight and the Buffalo road comparatively so, with one exception perhaps. In case of unruly horses accidents might occur, with carelessness on the part of those running the trains, though I have no knowledge of any accidents having occurred there.

Q. State whether the E. and N. E. R. R. is not a road running in competition with vessels on the lake during the season of navigation, and whether the construction of that road exclusively to the harbor would add materially to the business of the harbor.

Ans. The E. and N. E. Road is running parallel with the lake, and is competitor with it for the commerce of the lake. The construction or extension of the railroad to the lake at Erie, would add materially to the commerce at this point, in connection with other railroads projected. But I do not consider it essential to the creation and growth of that commerce that the E. and N. E. R. R. should form no other connection with railroads than at the harbor of Erie, for the reason that in the season of navigation such trade and business as the road would find it profitable to do, at the harbor at Erie, would be done without such exclusive connection, while in the winter season, when the lake is frozen up, it would be, in my opinion, the extreme of folly to require the Western Road, the Sunbury and Erie

Road, or the Erie and Northeast Railroad to pass down the severe grade to the lake and back again without advantages to any one, and occasioning unnecessary expense of motive power and delay of time in running.

(Complainants object to that portion of the above answer from the word "while," in the eighth line of this page, on the ground that it is no answer to the question and irrelevant.)

Q. State whether, in your opinion, during the season of the year when the lake is closed or of dangerous navigation, it would not embarrass and be a tax upon eastern, western, and southern trade, commerce, and travel, to compel the same to descend to the harbor of Erie, and, if so, why?

(Complainants object to the above question as irrelevant.)

Ans. In my opinion it would, and for the reason already stated. In descending to the harbor, a grade of about 120 feet has to be overcome, and in ascending the same grade would have to be overcome, to the point where the road now is, and would be about equal to five miles of time. In other words, from any point of divergence west of Erie, to the point of intersection with the Erie and Sunbury Railroad, or the Lake Shore road east of Erie, would increase the distance about five miles in time.

Cross-examined by Complainants.

Q. If the Erie and Northeast road had been exclusively connected with the harbor of Erie, would it not have benefited the navigation and commercial interests at that point?

Ans. I think it would, but that same result would be had by a connection of that road with the harbor, without being exclusive.

Q. Do you not know that there are laws passed requiring the Western, the Sunbury and Erie, and Erie City Road to go to the harbor of Erie?

Ans. I do know that laws have been passed requiring the roads to go to the harbor. The charter of the Erie and Sunbury and the Erie City Road require them to go to the harbor. The law of last winter requires the Western Road to extend to the harbor of Erie within two years, or so soon as the Erie and Sunbury Road, or other eastern road shall be built to the harbor, but they have the privilege of making other connections, as I understand the law.

Q. Do not the railroads coming into Cleveland come to the harbor there in the winter as well as summer, and is not the grade about the same as it would be to Erie?

Ans. They do run to the harbor at all seasons at Cleveland. I have no certain knowledge of the amount of the grade there. I have no recollection, except from the eye. I think that the road running east or southeast from Cleveland, that is the Cleveland and Pittsburg and the Cleveland and Erie Road, would have about the same grade that we would have. Of this I am not certain. It may be more, or it may be less; while the roads leading west from Cleveland,

and south—the Cleveland and Toledo, and the Cleveland and Columbus roads—have a little better grade, going in the valley of the Cuyahoga River. The valley of that river is more favorable to a railroad than the route of the others.

Q. Were you not an officer of the late Franklin Canal Company, and was not its eastern terminus at the depot of the Erie and Northeast Railroad?

Ans. I was an officer of that Company, and its eastern terminus was at the depot of the Erie and Northeast Railroad Company.

Q. Have you not as such officer and in connection with your company been active in endeavoring to have a connection, and through gauge between your road and the E. and N. E. R. R.?

Ans. As for the company I cannot answer. For myself individually, but not as an officer of that company particularly, I have favored the through gauge, at the same time desired connection with the water, and always have.

Q. From the location of the depot of the E. and N. E. road, are not Peach and Turnpike Streets much more obstructed by the locomotive in making up trains and the passage of trains, than when a highway is merely passed on the intervals of running?

Ans. My business has been such as not to give me so much opportunity for judging perhaps, as those who have been more about the depot, and I don't know that I am capable of answering really from observation. I have, however, frequently been at the depot, and have no recollection now of seeing the locomotives pass those streets frequently, except with the passage of trains.

Q. Do you mean to state that you have not seen the operation of making up trains, or that no such thing exists there, and is the want of observation on that subject the reason that you answer in chief, that it is no greater obstruction there than the ordinary crossing of a highway?

Ans. I have seen on a few occasions that I recollect, a locomotive passing those streets without a train to a switch, but not often, and I supposed at the time for the purpose of attaching the locomotive to another train on a different track. The want of observation is not the reason of my answer in my examination in chief as to its being no more of an obstruction than the crossing of any highway.

Q. How do you know that the crossings of Holland and German Streets and Ash Lane by the railroad could be accommodated to the grade of those streets? Do you know what the grade is, whether it is fixed by the councils or not; and if fixed, is it not subject to be changed by any future councils?

Ans. I know that the grades of those streets could be accommodated to the crossings of those streets by the railroad from my knowledge of the manner in which railroads and streets are generally constructed, and there being no difficulty in these instances in making a good crossing with slight expense. If you mean me to understand what the height or depression of the streets at the particular

point of crossing is above or below the general surface of the ground, then I cannot answer in feet or inches, but it is no great deal. If upon the other hand you mean me to understand the grade for a hundred feet, or any other given distance, rise or fall, as fixed by the councils, then I cannot answer *answer* in feet or inches, and I have no knowledge that the city councils have ever established the grade of those streets at or near these points. But nature has established a grade upon those streets, sloping gently towards the north, which cannot be materially changed, except by large expenditure. As to the change by the council, I would answer that I cannot say what they might do.

Q. How often have you travelled the Buffalo road beyond the point of crossing at Mills' since the construction of the railroad, and while in operation?

Ans. I could not answer, further than I have frequently travelled it.

Q. If you frequently travelled it, please state when it has been planked over at the crossing, has it not been so planked since last April?

Ans. As far as I recollect travelling it, there was a part of the railroad planked for a wagon way from the building of the road. It is my impression that some time last winter or spring, a greater portion of the railroad crossing was planked than had previously been planked.

Q. State how long you were a member of the city councils, and when your term of office expired?

Ans. For one year which expired in the spring of 1853.

Re-examined by the Respondents.

Q. State whether the river Cuyahoga does not pass through the city of Cleveland to the Lake, causing a deep valley and making it more expensive to cross the same than grade down to the harbor, and does that fact exist at Erie, and do not the Cleveland and Columbus, and Cleveland and Toledo Railroads at easy grades ascend the valley of that river reaching towards the south and west?

(Complainant objects to the foregoing question, on the ground that it is leading in every point of enquiry, and susceptible of being answered by a simple negative or affirmative response.)

Ans. That river does pass through what is now the city of Cleveland, in a deep ravine or valley, and in my opinion, the bridging of the gulf would be a great deal more expensive than to grade a road to the harbor; and that the roads mentioned do pass southwest out from Cleveland on a comparatively favorable grade.

Cross-examination resumed by Complainants.

Q. Did you ever make an examination of the cost of grading the roads to the lake at Cleveland, and the cost of construction of a bridge across the river at the point spoken of; if so, when?

Ans. I have never made any particular examination or estimate of the cost of either, but having frequently been there, and judge of the relative costs from my knowledge of the costs of similar works.

Q. Where have you had practical knowledge of the cost of grading railroads to the lake, similar to that at Cleveland?

Ans. I have that knowledge in the construction of the road west of Erie, though not to the lake.

Q. At what point on the western road was their cutting similar in depth to that in grading these roads to the harbor at Cleveland?

Ans. Perhaps at no point equal in depth to the cutting at the harbor there but at Elk Creek approaching. I judge of the relative cost from my knowledge generally of the expense of removing a yard of earth similarly situated.

Q. Have you any knowledge as a contractor on any railroad of the cost of excavation of an embankment?—if so, state where.

Ans. I have knowledge as a contractor, and from work done upon the western road.

Q. Do you know what the grade is on which the roads you speak of pass out of Cleveland, up the Cuyahoga River?—if so, state your knowledge on the subject.

Ans. I have no knowledge, except from looking at the roads and travelling upon them.

WM. S. LANE.

Sworn and subscribed before us, June 23, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 2½ P. M. the Examiners met, and John F. Tracey, produced by respondents, was sworn, and testified as follows: I now reside in Chicago, Illinois; in Erie, until 15th of May last, from nativity; am 27 years of age, and a railroad superintendent.

Q. State whether you ever were superintendent of the Erie and Northeast Railroad, and if so, from when to when.

Ans. I was superintendent from the 6th of April, 1852, to the 15th of May, 1854—a little over two years.

Q. During that time, state whether your business required you to pass frequently over the Erie and Northeast Road.

Ans. It did.

Q. Are you acquainted with the manner in which the E. & N. E. R. R. crosses Peach, Turnpike, and Parade Streets in the city of Erie? and if so, state if it crosses them at or near grade?

Ans. I am acquainted with the manner in which the railroad crosses those streets, and it does cross at grade or nearly so.

Q. Does the railroad at these crossings, or either of them, impede or obstruct the free use of them as public highways?

Ans. The railroad, as constructed, does not impede or obstruct the free use of any of them as public highways.

Q. Are you acquainted with the manner in which the E. & N. E. R. R. crosses German and Holland Streets and Ash Lane in the city of Erie? Are those streets improved or worked at the points of crossing. If improved, would or would not the crossing be similar to and of as easy passage as that of Parade Street?

Ans. I am acquainted with their present condition. They have not been worked at or near the crossings except Holland, which has been fixed on both sides of the track by the railroad company for the accommodation of teams passing. If they were improved the grade would be the same, or nearly so, as Peach, Turnpike, and Parade Streets.

Q. Could or not the grades of those streets at the point of crossing be accommodated to the railroad as located without injury to the adjoining lots or those streets?

Ans. In my judgment they could.

Q. Are you acquainted with the manner in which the E. & N. E. R. R. crosses the Buffalo road at Mills' in Harborcreek?—if so, state whether it is crossed at or near grade.

Ans. I am acquainted with the crossing, and it does cross at grade, or nearly so.

Q. State whether at that crossing the E. & N. E. R. R. impedes or obstructs the free use of the Buffalo road as a public highway.

Ans. It does not obstruct the free use of the highway.

Q. Do you know the distance from cattle guard to cattle guard at that crossing?—if so, state the same. State also, if you can, the number of feet occupied by the railroad in crossing the Buffalo road at that point the distance from the north rail of the track to Mills' house, and from the south rail of the track to the fence of Gideon Wagner.

Ans. The distance between cattle guards is 864 feet. The distance of public road used by the railroad in crossing (that is what I have always considered as used) is 310 feet, and is planked the entire distance, the planking being full between the rails and one row of planks on the outside of the rails on the end of the ties, the edge of the outer plank having been tamped up full of gravel to the outer edge and an even surface made. The distance from the north iron rail of the track to Mills' house is 44 feet or more. The distance from the south rail to Wagner's fence is 35 feet. I made these measurements this morning.

Q. When teams and trains approach that crossing, going in the same direction, either east or west, state how far a person upon the Buffalo road from the point of crossing the Buffalo road can see the trains.

Ans. A person going from the west, and a train going from the west, the view of the train to one on the public road is unobstructed, I should say for half a mile or more west of the crossing. A train

coming from the east, and a person upon the highway coming from the east, the view is unobstructed from the Harborcreek station to the crossing, a distance I should think of near a mile. Perhaps at this particular season of the year a person at the station might not be able to see a train for the whole distance, but you could for the whole distance see the smoke or exhaust of the engine, and the view at any one place is unobstructed for a thousand feet or more.

Q. When the teams and train approach the crossing in opposite directions, state how far a person upon the Buffalo road from the point of crossing can see the trains either east or west of that point.

Ans. When a train or an engine is 750 feet west from the centre of the crossing it can be distinctly seen by persons approaching the crossing from the east on the highway for 1800 feet, I should judge. I measured 900 feet, and was then in a direct line of the engine, and walked some distance further, and still had a distinct view of the engine. From where the engine stood west of the crossing, to the point where I measured east of the crossing, is 1,650 feet—that is, the engine would be 750 feet west of the centre of the point of crossing, and the observer 900 feet east, making 1,650 feet. From the centre of the crossing east, I placed an engine 750 feet, and went 1,650 feet west of that centre, on the Buffalo road, and could distinctly see the locomotive, and stood then in the centre of the public highway, and was then in range with the top of the roadway, on the west bank of the 6 mile creek, and the engine, which was about half a mile west of the crossing, and could distinctly see the engine, looking directly down the highway to the east; and any object, man, horse, or wagon, that might be on the road west of the top of the hill on west side of 6 mile. From a point 550 feet from the centre of the railroad crossing to a point west in the public highway, the view of an engine or a train east of the crossing is unobstructed for miles—so far as the eye can reach.

Q. When did you make this examination and measurement?

Ans. I made it to-day.

Q. State whether as superintendent of this road you have passed over this crossing upon the engine, and if so, whether there is any obstruction to intercept from the engine a full view of the Buffalo road east and west of the crossing, and if so, for about what distance?

Ans. I have passed over this crossing upon the engine repeatedly and run the engine upon nearly all the trains frequently. The view from the engine upon the highway running east can be distinctly seen ahead by the engineer for a thousand feet or more, the same running west, I should judge.

While I was superintendent of the road it was one of the rules and regulations of the road that the engine should blow a signal whistle one-half a mile from the crossing running each way. I think the same rule is in force now.

Q. Whilst you were superintendent of this road do you know of any collision taking place at this crossing between the engine and a carriage or other vehicle?

Ans. I do not.

Q. State whether the E. & N. E. R. R., is not a road running in competition with the vessels upon the lake during the season of navigation, and whether in your opinion the construction of that road exclusively to the harbor of Erie would add materially to the business of the harbor?

Ans. I always considered and do now that the steamers and vessels navigating Lake Erie, and the Lake Shore road from Buffalo to Cleveland of which the E. & N. E. R. R. is a part were running in competition with each other during the season of navigation, and know that great exertions are made by either party to obtain the business, trade and travel from the other. In my judgment the construction of the road exclusively to the harbor would not add to the business of the harbor of Erie.

Q. State fully whether trade, commerce and travel coming from the east and designed for the west, or from the west designed for the east, does not during the season of navigation ship at the first port at which the lake is reached, and if so, why?

(Complainant objects to this question as leading and irrelevant.)

Ans. All through freight on arriving at Buffalo and Dunkirk from the east, and at Cleveland, Toledo, Monroe, Detroit and all main western ports from the west, during the season of navigation does invariably go by the lake. The passenger travel is divided, the boats cut fare during the season of navigation, and carry at reduced rates.

Q. State whether merchandise and travel reaching the lake from the east at Buffalo or Dunkirk, designed for the west of the lake, can or not be shipped as cheap from either of those ports to the west as it could if transported by railroad to the harbor at Erie, there to be shipped.

(Claimants object to this question as irrelevant and leading.)

Ans. It can, and much cheaper. The rates from Buffalo and Dunkirk by lake to Cleveland, are lower than rates by railroad from Buffalo to Erie, and to other western ports in proportion. Another reason is, that freight after shipping at Buffalo or Dunkirk require no transhipment until it reaches its destination on the lake.

Q. Is that so on the railroad?

As. It is not, there would be an additional transhipment between Buffalo, or Dunkirk and Cleveland.

Q. About what is the elevation of the Erie and N. E. Railroad where it passes through the City of Erie above the harbor of Erie?

Ans. I don't know positively. In my judgment it is over one hundred feet.

Q. State whether during the season when the lake closed or of dangerous navigation, it would or would not embarrass and be a tax

upon eastern, western and southern trade, commerce and travel, to compel the same to descend to the harbor at Erie, and if so, why?

(Complainant objects to this question as irrelvant and mere matter of opinion.)

Ans. It would. It would require more time, as the distance is increased, the grade of the road being much increased, and would require very much more motive power to haul the trains.

State who were elected the first directors of the Erie and North East Railroad, if you know, and if you have a copy of the records of the company at this time. If you have, append a copy of the same to your evidence.

(This question objected to by complainant as irrelevant.)

Answer. I know from the minutes and books of the company who they were. At the first election held for election of Directors of the Erie and N. E. R. R. Company, held January 27, 1847, Charles M. Reed was elected President, William Kelley, Henry Cadwell, Smith Jackson, A. W. Brewster, M. Courtright, Jas. Williams, were duly elected Directors for the ensuing year; Giles Sandford, Treasurer.

Q. State, if you know, from the records kept by the company when the line of the road was adopted by the company, by what vote it was, and who at that time was the president and directors of the company. State when John A. Tracy, Prescot Metcalf, A. Scott, John Branby and John H. Walker were first elected Directors of this company.

(Complainants object to this question as irrelevant, and if relevant not competent to be proved in this manner.)

Ans. The road was located in the spring or summer of 1849. The Directors of the road for that year were Charles M. Reed, President, Henry Cadwell, Smith Jackson, Milton Courtright, A. W. Brewster, James Williams, William Kelley, the Directors. May 25th, 1849, on motion of William Kelley, seconded by James Williams, Resolved, that the straight line from Erie to the point where the north line diverges be adopted. August 8th, 1851, John A. Tracy was elected a Director, to fill the vacancy occasioned by the death of A. W. Brewster. Prescott Metcalf and John H. Walker were first elected Directors January 18th, 1853, A. Scott, November 26th, 1853, and John Brawley, December 8th, 1853. By the records kept by the company the vote on the adoption of the line was unanimous. I have learned the above facts from the records and books of the company.

Q. State whether there is among the papers on file in the office of the E. and N. E. R. R. Co. a report signed by William Kelley, A. W. Brewster, and Milton Courtright, Directors of the company, on the subject of a route of the railroad, recommended by Mr. Camp, engineer of the same; if so, attach an authenticated copy of the same to your answer.

Ans. There is such a paper, of which this paper hereto annexed

to the testimony and signed by the examiners, and also by myself, and marked as "Exhibit A," is a true copy.

(Complainants object to this evidence and copy of report being introduced, on the ground that the matters therein referred to are irrelevant, and if relevant said report is not legal evidence of the facts and matters therein stated.)

Q. State whether you know of a notice having been served by Thomas Elliot and John Jacks, purporting to be road commissioners of Harborcreek Township, upon the Directors of the Erie and Northeast road, their treasurer, or either of them, relative to the repairing of the diagonal crossing of the Buffalo road, by the Erie and Northeast road in that township; and if so, append an authentic copy of the same to your answer to this interrogatory.

Ans. I have seen such notice. This paper, signed by the examiners and myself, and marked as "Exhibit B," contains an accurate copy of the same. I did not see it served. I was told by the President and by the Treasurer of the company, and I think by several of the Directors, that it had been served, also by Thomas Elliot that he had served the same.

Q. State, if you know, when that notice was served.

Ans. Mr. Elliott told me, at Harborcreek, on the 9th of December, 1853, that the notice had been served a day or two previous. It was on Friday.

(Complainants object to the above question and answer as not being evidence.)

Q. State, if you know, what the Directors of the Erie and Northeast Railroad did, or ordered to be done in compliance with the above notice, whether you had an interview with the road commissioners, or either of them, on the subject; and if so, state what the commissioners wished the company to do, as to putting in better order that crossing.

(This question objected to, as the answer would not be evidence, and irrelevant.)

Ans. I received notice on the 8th of December from the president and directors of the company, through the secretary, J. C. Spencer, that that notice of which a copy is appended, had been served upon the company, and directions from the president and directors to put the crossing in such repair as was called for in the notice. Not understanding the notice exactly, I requested either personally or through others, that the commissioners would meet me on the ground the next morning, which would be the ninth, and point out what they wanted done with the crossing. Thomas Elliot, one of the commissioners, met me on the ground the next morning, the morning of the 9th, the others did not appear. He pointed out what they required, which was in substance the same required in the notice. I asked him how much time he would give me to do it? He replied three days. I told him I would have it done within the time specified. I asked him if that was all they wanted at that crossing? He answered

it was. I asked him if they had ever asked for the repair of that crossing before, in that way? He said no, and said he thought it would not have been called for, had not the gauge of the road been changed or an attempt been made to change it from 6 to 4 ft. 10 inches. I said to him, you could have had that crossing fixed in that way a long time before by making application to me. He replied that he had no doubt of it, and left. I commenced immediately with a large force of men and teams and materials that morning, and had it nearly completed by 4 o'clock in the afternoon of that day, when a collection of persons (from 150 to 300) assembled upon the work, and tore it up. It would, if left alone, have been completed in an hour.

(The above answer objected to by complainants as not legal evidence.)

Q. State if you know what real estate in Erie the Erie and Northeast Railroad Company own on the line of their track, the location of the same, and how much of it if any was purchased and when, and the cost of the same, with a view to avoid the occupancy of Penn Street?

(Complainants object to the question above propounded.)

Ans. They have purchased from Schwengel (in July, 1853), McSparren (in July, 1853), from James M. Rood (March 8th, 1851), from John A. Tracy, Milton Courtright, and John Riddell's estate in January, 1849, all amounting to $20,165, and all situated between Sassafras on the west, and French on the east, except that purchase from James M. Reed, Lot 379, situated on the east side of French Street. The lots bought from Schwengel, Haverstick and McSparren lie between Peach Street and French Street, and immediately north of the railroad. Those three lots cost $14,105 00. The three lots last mentioned were purchased for the purpose of constructing a bridge and tracks north of the road, and for the purpose of avoiding being on Penn Street, from the intersection of Turnpike and Peach Streets west, and for the purpose of getting to their own ground on the north of Penn Street, where they have 4½ acres (the entire block between Penn and Washington, Peach and Sassafras Streets).

Q. State the condition of the Buffalo Road at the crossing in Harborcreek as compared with the requirements made in the notice given by the road commissioners of Harborcreek Township to the directors of the E. & N. E. R. R.

Ans. I think the requirements of the notice have been fully complied with, and I think that I have heard Mr. Elliott, the road commissioner, say that it was done to his satisfaction.

At 7½ P. M., the examiners adjourned until June 24th (Saturday), at 9 A. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

June 24th, 9 A. M. Examination resumed, and John F. Tracy being again on the stand, the direct examination was continued.

Q. State how the location of the E. & N. E. R. R., in Erie, accommodates the local trade and travel at Erie, and along the same, and whether that trade would be as well accommodated by having the railroad terminate exclusively at the harbor of Erie.

Ans. In my judgment the present location of the road accommodates the local trade and travel well. I think it accommodates that trade and travel better than if it was located exclusively at the harbor. That it is more accessible than if located exclusively at the harbor.

Q. State whether commencing the railroad at the harbor of Erie, and terminating the same where it now does at the New York State line, what east and west roads it would cross, how it would cross them, and whether it would cut the farms as or more disadvantageously than on the present line.

Ans. It would cross the Lake Shore Road, and the Buffalo Road. It would necessarily cross them diagonally, if would intersect the farms from the point where it would intersect or connect with the present line of the road, diagonally, and would be more disadvantageous to the farms to that point, than the road as now located, as the present location of the road cuts and intersects farms at right angles, or nearly so, and on the line of farms or nearly so, extending all the way down for 5 or 6 miles, where I suppose the intersection would occur.

Q. When the railroad was located, who owned the land north and who owned it south of Penn street?

Ans. Milton Courtright owned on the south, and the E. & N. E. R. R. C. on the north side, extending, he on the south and the Railroad company on the north, the entire distance from Peach to Sassafras.

Q. State whilst you were superintendent, about what proportion of the crossing of Peach and Turnpike streets were used in making up trains, and whether that would not be avoided by having an uniform gauge through Erie.

Ans. As the road now is there, it is impossible to make up trains without crossing Peach and Turnpike streets considerably. The making up of trains would be entirely avoided by an uniform gauge on the Lake Shore road. The regular running of the trains on the road would cause the locomotive to cross those streets two or three times for each train, provided the road was operated as a through road, and as the road is now operated without a through gauge, it requires on an average 10 to 15 times crossing of a locomotive for each train. That is in the making up and getting trains ready.

Cross-examined by Complainant.

Q. Are you not a stockholder in the E. & N. E. R. R. C., if not

now, have you not been a stockholder, if you have been a stockholder, when and to whom did you transfer your stock?.

Ans. I am not a stockholder in the E. & N. E. R. R. C.; I have been; I sold and transferred my stock to John A. Tracy last fall, some time in October or November.

Q. Have you been an active participant in the late controversies between the City of Erie, the citizens of Harborcreek, and the Railroad Company, on the side of the Railroad Company, and have you not made voluntary affidavits to be used in the Circuit Court of the United States against the City of Erie, and citizens of Harborcreek?

Ans. I was Superintendent of the E. & N. E. R. R. during the troubles. I don't know that I was a participant in any other way than Superintendent, and the execution of the written orders of the President and Directors of the Railroad Company in regard to my duties as Superintendent, taking care of the road, I have made affidavits in accordance with instructions received as Superintendent, against persons whom I knew had been participators or abettors, in the destruction of the E. & N. E. R. R.

Q. Was not your home, during the controversies above alluded to, at the residence of your father, and was not he then President of the Railroad Company, and is he not now, and a large holder of the stock?

Ans. It was my home at that time. My father has been President of the Road since the 26th of November, 1853. I suppose that he is a Stockholder, I don't know the amount he owns.

Q. Do not the Mayor and Councils establish the grade of the streets of the City of Erie? Do you know the grade established by them at the point of crossing said streets by the Railroad? If so, by what means do you know it?

Ans. I have always supposed that the authorities of the city established the grades, or the city Surveyor through them. I have seen stakes set at some of them, and so understood the grade to be established at all of them. I know it by the stakes and by the assertion of the authorities.

Q. Did you see by whom these stakes, referred in your answer above, were set, if so when were they set upon the respective streets? By whom were they set, and what power do you mean by the authorities, from whom you say you understood they were grade stakes?

Ans. I was not present when the grades were set. I mean by the authorities the City Surveyor, Samuel Low, the High Constable, Joseph Deemer, and Samuel L. Foster as High Constable, and the Council. I can't say what time the stakes were set, I don't recollect.

Q. You say in your examination in chief that 310 feet of the line of railroad at the crossing in Harborcreek is planked, gravelled and tramped. State when that was done to that extent.

Ans. Part of it was done when I came on the road two years or

more ago, sufficient to make two suitable and convenient crossings. The remainer was done last December and January two or three times, and torn up by the people and destroyed, and again put down about the first of February last, and has remained in that condition since. It was put down to the extent of 310 feet about the first of February last.

Q. What is the whole width of ground taken by the company for railroad purposes at the point of crossing in Harborcreek and immediately east and west of it, what the width of the Buffalo road at that point, and does not the railroad ground there, lie upon the Buffalo road, or upon a portion of the Buffalo road for 80 rods or more?

Ans. 864 feet between cattle guards. In my judgment not over 350 feet or 400 feet of the Buffalo road in length are taken for railroad purposes, at the present crossing, which is planked or nearly so, 300 feet planked. The ties are from 8 to 9 feet in length, and the width between the rails four feet ten inches. This is the entire width of ground taken for railroad purposes. The width of the Buffalo road at the point of crossing is about 74 feet between fences. East of the crossing and north of Plara Elliott's house, the railroad runs some distance, I don't know what distance, I never measured it, on the ground formerly occupied by the Buffalo road. The line of the Buffalo road was changed farther to the north avoiding two crossings of the railroad, and in my judgment making a shorter and straighter road of less grade than the old road.

(Complainant objects to all that part of the above answer from the words "the line of the Buffalo Road," as not being an answer to the question put or called out by it.)

Q. By your examination in chief, you appear to be familiar with the records of the company. Do you not know, from those records, or otherwise, that the width of ground taken by the railroad company for railroad purposes, at the point of crossing aforesaid, and along the line generally, east and west of it, is generally about 60 feet? And if not, what is the true width of ground taken by the company from the inhabitants along the line for the use of the road?

Ans. At no point between the cattle guards at the crossing is the width of the ground occupied by the railroad more than 9 feet. At other points along the line, where the company have purchased the right of way through farms and out-lots, it is not less than from 4 to 6 rods.

Q. In your examination in chief, you mention certain measurements of the railroad at the point of crossing in Harborcreek, and experiments as to how far a locomotive could be seen by persons travelling the Buffalo Road, made by you yesterday. Who was with you at the making of those experiments and examinations, and did you make them for the purpose of testifying to the result in this case? If not, for what purpose did you make them?

Ans. M. W. Caughey, W. L. Scott, C. F. Norton, D. B. McCreary,

John Clemens, I. R. Ferguson, and Charles Shears were with me. I made them for the purpose of knowing positively, and giving the result in evidence here.

Q. State who of the Directors were present at the meeting at which you say you know, from the records, that the present line was adopted, and state whether they all voted in favor of it; if not, how many voted for, and how many against it, if any?

Ans. On the 5th of July, 1849, present, Charles M. Reed, President, H. Cadwell, Brewstar, Williams, and Kelley. On motion of William Kelley, seconded by James Williams, on motion that the straight line to the point where the north line diverges be adopted as the line of the road; it was adopted. I don't know how they voted; my impression (which is not from the record) is that it was adopted unanimously.

Q. In your examination in chief, you state that freight east, and going west, reaching the lake at Buffalo or Dunkirk, would require an additional transhipment, if it came on to Erie by railroad, instead of taking water at Buffalo or Dunkirk; explain why that is so.

Ans. Because the gauge of the Lake Shore Road is 4 feet 10 inches; the gauge of the New York Central, terminating at Buffalo, 4 feet 8½ inches; and the gauge of the New York and Erie, terminating at Dunkirk, is 6 feet.

Q. What is the difference in the price of freight going from Erie to Buffalo by railroad or by the lake?

Ans. I don't know the exact difference. There is a difference: it is lower by lake. It was so last season; I don't know how it is this season.

Q. Is not the harbor at Erie superior to, and, if its advantages were improved, would it not afford greater facilities to the trade and commerce of the lakes than those of any other harbor on the south shore of Lake Erie west of Buffalo?

Ans. I think it is, and that it would.

Q. Would not the produce of the country west of Erie, seeking an Atlantic market through the New York and Erie canal, be likely to be shipped at the superior harbor at Erie, if the western road extended exclusively to that harbor, and if not, why not?

Ans. I think it would not be shipped at Erie from the cars of the the western road, if those cars could run on to Buffalo without transhipment at Erie. The time required to tranship at Erie would be lost time, requiring one more transhipment than to run through, and the time and expense required at Erie, in transhipment. This applies to freight not destined for the lake at all. Freight designed for the lake would take the water at the nearest port, and continue on till it reach its destination.

Q. Do not the lake craft and the canal boats meet and lie side by side at Buffalo, thus affording speedy facilities of transhipment, and is not the terminus of the Lake Shore Road at Buffalo such distance from the canal that said freight, arriving there, would require

one transhipment to drays, some distance of drayage, and an additional transhipment on board the canal boats, and would not the expense and delay of all that be more than equivalent to a transhipment at Erie from the cars to the lake, if cars run to the harbor?

Ans. The facilities of the steamboats unloading into canal boats are equal, as the cars of the Lake Shore road run to the dock, where canal boats are, and unloading from the cars to the canal boats. There would be no expense of drayage, no more delay in transhipment from cars than from boats.

Q. Are there any facilities other than draying and wagoning a mile or over, of transhipping goods and passengers from the depot at Erie to boats and vessels at the harbor at Erie?

Ans. There are none at present.

Q. Would not this prevent either passengers or freight from going on to the Lake at Erie, or from the Lake to the cars at Erie, in going either east or west?

Ans. I think not, for this reason: goods shipped from Buffalo and Dunkirk to the west would ship from those ports by the Lake instead of changing from the cars of the New York Central Road at Buffalo to the cars of the Lake Shore Road, or the New York and Erie cars at Dunkirk to the cars of the Lake Shore Road, and then to be transhipped at Erie, which last would be an additional expense, as the freights by the Lake west from Buffalo or Dunkirk are as low as from Erie west. The same expense at Buffalo or Dunkirk would occur here, which would make one more transhipment than to ship at Buffalo or Dunkirk for the west.

Q. If the E. & N. E. R. R. ran to the dock at Erie, and there was no change of gauge at Buffalo (Erie harbor being, as you say, the best on the Lake), why would not freight and passengers take the cars here in going east?

Ans. I did not say Erie harbor was the best on the Lake. I said it was superior to any west of Buffalo on the south shore of the Lake. Freight and passengers going east would undoubtedly go by boat to Dunkirk, which would avoid one transhipment to the cars from the Lake Shore Road at Dunkirk to the New York and Erie Road. If the gauge was uniform from Erie east both by the New York and Erie Road and the New York Central Road, then I think of course trade and travel would go from here by the railroad, but it would depend upon circumstances. If boats were running to points east of Erie (Buffalo and Dunkirk), then freight or passengers could be transported to those points as cheap, or nearly so, as they could to Erie, thereby saving the rates by railroad from Erie to Dunkirk or Buffalo.

Q. State how far the terminus of the E. & N. E. R. R. is from the harbor at this time, and would not the cost of transhipping vessel loads of goods on to it entirely prevent transhipment, even if there was a through gauge for such goods to go east?

A. It is about a mile. The cost of transhipping would prevent

any person doing so, if they wished to. At the same time, the same freight could be transported from any western port cheaper to Buffalo by Lake than if brought to Erie and transhipped by cars to Buffalo.

Q. Is there not frequently a period in the spring of the year, when the Lake is open to the harbor at Erie, and still closed at Buffalo and Dunkirk, and would not, during such periods, freight destined for the eastern markets go by railroad from this harbor if the road east connected with it, and if there was a through gauge, and could such occur as the road is located, even if there were no break of gauge east?

Ans. I think there is generally from 10 to 15 days, when the Lake is open at Erie Harbor, and not at Dunkirk, although a boat might occasionally get through. If the gauges were uniform to the east, and the railroad track to the dock, freight coming here at that season of the year would be shipped east by the railroad. As located now, it would be an additional expense of cartage (perhaps of 25 to 30 cents per ton) from the Lake to the railroad.

Q. You state that a railroad running from the harbor east to the New York State Line, would cut the farms diagonally for 6 or 8 miles east, but that the present location runs along the line of lots and farms to considerable extent. Now state whose farms it runs along the line of.

Ans. The present location of the road runs through the edge of Rudy Shank's farm, nearly on the line of it, Messrs. Whitleys, Riblet's, Cunningham's, Ebersole's, Thistyacri's, Brown's, Crowley's (near the south line), Sheveiler's, from there down I don't know exactly how near the line of farms it runs. From Shank's farm west it runs directly on the line of lots to French Street in the City of Erie. The road runs parallel with the lines of the farms mentioned.

Q. Does not the present location of the road run through and not along or on the line of each of those farms?

Ans. It cuts Shank's, Mrs. Whitley's, and Riblet's near the north line of their farms, the others I don't know positively. The railroad, to the best of my knowledge (as I have been informed by the reputed owner), runs along the dividing line between Canty's and Chambers' farms.

When did the E. & N. E. R. R. C. become the owner of the land north of Penn Street, and from whom did it purchase?

Ans. In January, 1849, the records of the company say, it became the purchaser. They purchased from Milton Courtright, John A. Tracy, and the estate of John Riddell, for $4000 00.

Q. What length and breadth of ground is required for the making up of such trains as you usually make up at the depot of the E. & N. E. R. R.?

Ans. That would depend upon the length of the train. During

the winter season it would require tracks occupying a space of ground from 75 to 100 feet in breadth, and 2000 feet in length, to accommodate the business of the road at the time I left the road.

At 1¼ P. M. the examiners adjourned until 2½ P. M.

JAMES SILL,
GEO. H. CUTLER,
Examiners.

2½ P. M., examination resumed, and Mr. Tracy being again on the stand, the cross-examination was continued.

Q. Is the business of the railroad more or less active in the season of navigation of the Lake or afterwards?

Ans. The business of the Lake Shore Road is more active during the season when navigation is suspended. This is from Buffalo to Cleveland, including the E. & N. E. Road.

Q. You speak of the present location of the E. & N. E. R. R. as accommodating the local trade at this place better than if it had been constructed to the dock; why is this?

Ans. All the freight designed for Erie can be drayed from the present location to any part of the city easier than it could from the dock, and much more convenient for the trade of the country adjacent to Erie.

Q. Would it be more inconvenient that it is at Cleveland, or more so than it was when trade embarked on steamboats or vessels at this point, or arrived here from the lake by the same means?

Ans. I think it would be more inconvenient than it is at Cleveland, as there is a greater hill to overcome than there is at Cleveland. I don't know that it is any more inconvenient to get down to the lake now than it was when trade arrived here or departed by steamboats.

Examination in chief resumed by Respondents.

Q. State, if you can, the cost of construction of the E. & N. E. R. R., constructed within the city of Erie, exclusive of the cost of the land purchased as heretofore testified by you. If you know the same, state how you know it.

(Complainants objected to the above question as irrelevant.)

Ans. From the estimates and vouchers and records of the company, I assisted in making up the statement, which amounts to ($66,039 37) sixty-six thousand thirty-nine dollars and thirty-seven cents; with the land purchased it would amount to (86,204 37) eighty-six thousand two hundred and four dollars and thirty-seven cents. This sum includes the depot buildings, freight house, and all other buildings of the company in the city. This estimate was

made last January. There have been some expenditures since, I can't say how much.

JOHN F. TRACY.

Sworn and subscribed before us, June 24, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Exhibit "A."

Referred to in the testimony of John F. Tracy.

Exhibit A.

To the President and Directors of the Erie & Northeast Railroad Company.

The subscribers, a committee of the board, went yesterday to the Six-mile Creek, and spent the day in conference with the different individuals owning buildings upon the State Line, in that neighborhood. We are of opinion that a compromise can be had with them all, on terms which will be advantageous for the company to accept, except with Twitchell. He seems to be opposed to the road touching him anywhere, and will probably not be satisfied with anything the company can or will do on any line running through his land. We think the only difficulty we will have with the others will be to fix the amount; they probably expect more than the company will feel justifiable in giving. We could get no definite offer from them, but they have promised to be up during the week for further conference, and be prepared to make an offer. The committee are of opinion that their offer should be accepted if anywhere reasonable, as an inspection of the ground shows its great advantages in passing through a thickly settled neighborhood, on the score of security, independent of the question of speed and cost of running, which will always be more or less affected by curves. If a settlement is made with all the others but Twitchell, the committee would recommend a slight curve to the north of Twitchell's house, and between his house and barn. This would be so slight as not materially to affect the road. If settlement cannot be made with the owners of buildings, then we must go round them, as the law does not allow of any removing of buildings without the owner's consent. The question in that event will occur whether we had better adhere to our straight line, or as near as possible, making slight curves around the buildings, or depart from the line through the whole neighborhood, as recommended by Mr. Camp. We examined the question carefully and are clearly and most decidedly of opinion that to adhere to the straight line and curve round the buildings is the true policy. There are many reasons to our mind influencing this decision.

In the first place, these several small and slight curves will not

probably be more objectionable than the large curve recommended by Mr. Camp. In the next place, the road can be made at much less cost, and in the third place, it will admit of straightening up hereafter, when arrangements can be made with the owners.

On an examination of the ground recommended as the line drawn by Mr. Camp, we find that it will increase the expense of crossing the Six-mile Creek and Elliott's Run largely, besides having low and worse ground a portion of the way.

If a curve to clear all the buildings should be adopted, it seems clear to the committee, that one to the south of the road will be much preferable, as costing much less. This consideration ought to be decisive; the damages being equal on both routes, and we can see no perceptible difference. In our opinion the damage to the farms on either curve, to the north or south, will be greater than in the straight line with the curves around the buildings. On putting the question to all the inhabitants interested, whether they would prefer the road to run in the front or rear of them, all said they would prefer it to run in front; and we are clearly of opinion it will be easier to arrange with them on the straight line, and will cost less to the company.

The committee would, therefore recommend that the straight line be adhered to, and that curves be run round such buildings as could not be removed by an equitable and fair arrangement with the owners.

Erie, 11 Oct., 1849.

WILLIAM KELLEY,
A. W. BREWSTER,
M. COURTRIGHT,
Committee.

This paper referred to in the testimony of John F. Tracy as Exhibit "A."

JOHN F. TRACY.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Exhibit "B."

To the President and Directors of the Erie and Northeast Railroad Co.:—

You are hereby notified that unless the diagonal crossing of the Erie and Northeast Railroad, where it crosses the Buffalo or Ridge road near the residence of Gideon Wagner and John M. Mills, in the township of Harborcreek, is made safe and secure for the public by gravelling and planking the said road along the whole extent of such diagonal crossing until it is made level with the railway, within three days after the service of this notice, the obstruction created by the

said crossings will be removed by the undersigned. We have been advised by legal counsel that the crossing as it at present exists is a public nuisance which we would have a right to abate, and we give this notice in order that the company, by a compliance with the request which we have made, may prevent the necessity of our resort to such an alternative.

THOMAS ELLIOTT,
JOHN JACKS,
Road Com'rs of Harborcreek T'p.

This paper referred to in my testimony as Exhibit "*B.*"

JOHN F. TRACY.

GEO. H. CUTLER.
JAMES SILL,
Examiners.

Miles Boyles, produced by respondents, was sworn, and testified as follows: I reside in Erie; am a carpenter by trade, but have followed the construction of railroads for the last four or five years; am 31 years of age.

Q. Do you know where and how the Erie and Northeast Railroad crosses Peach, Turnpike, and Parade Streets, in the City of Erie?

Ans. I do. It crosses Peach and Turnpike Streets at grade. At Parade Street there is a small elevation.

Q. State whether the railroad at the crossing of Peach and Turnpike Streets impedes or obstructs the free use of those streets as public highways?

Ans. It does not.

Q. Have you measured the height of the bridge on State Street, the height of State Street above the bed of the creek, the width of the travelled part of State Street at that point, the distance between the bents of the bridge at the point of crossing, and the width of the bridge over the tail race at McSparren's mill on State Street? If so, state the same.

Ans. I have measured them. The bridge over State Street is 12 feet 4 inches high in the clear, that is, from the ground to the bottom of the stringer. State Street is 4 feet above the bed of the creek at that point. That elevation is of a width of about 14 under the bridge. The distance between the bents of the railroad bridge (over State Street) is 18 feet 9 inches. The bridge over the tail race at McSparren's mill on State Street is about 15½ feet wide in the clear and about 80 feet in length. This latter I guess at, I cannot state positively.

Q. State if you kept an account for any number of days of the times the locomotive crossed Peach and Turnpike Streets in one day? If so, state the same. State the number of times, and what proportion of those times were in making up the trains.

Ans. I have kept account for six days, commencing Monday,

April 17th, at 5 A. M., and continuing for 6 days. On Monday the locomotive crossed those streets 105 times; on Tuesday, the 18th, 115 times; on Wednesday, the 19th, 143 times; on Thursday, the 20th, 111 times; on Friday, the 21st, 100 times; on Saturday, the 22d, 95 times. I think about five-sixths of those times were in making up trains.

Cross-examined by Complainants.

Q. Who employed you to keep this count, the days which you did so, and if you say by the E. & N. E. R. R. Co., please state how long you have been in their employ, and in what capacity?

Ans. I was employed to keep count by the Railroad Company. I have been in their employ about 6 months and 23 or 24 days, as near as I can recollect, employed as a watchman.

Q. Between what hours of each day did you keep account of the times of the passage of the locomotive?

Ans. I commenced Monday morning at 5 o'clock, and kept count till Tuesday morning at 1 o'clock in the morning. At 4 Tuesday morning I resumed, and kept count till 2 o'clock Wednesday morning when the last train went out; and I think it was 5½ (as near as I can recollect) Wednesday morning, when I commenced, and quit at 2 Thursday morning; commencing at 5, or about that time, on Thursday, Friday, and Saturday mornings, and leaving off at 2 o'clock of the following morning, or thereabouts.

Q. Does not the Erie and Northeast Railroad on Peach and Turnpike Streets, together with its use by locomotives and trains of cars, obstruct and impede the free use of those streets as public highways?

Ans. The road itself I don't think does, but you can't well pass with a team when the locomotive and cars are running by.

MILES BOYLES.

Sworn and subscribed this 24th day of June, before

JAS. SILL,
Ex'r.

Miles W. Caughey, produced by respondents, was sworn, and testified as follows: I reside in Erie; am 42 years of age almost; and am Secretary of the Erie Canal Company.

Q. State if you know the place and manner in which the E. & N. E. R. R. passes Peach, Turnpike, and Parade Sts. in the city of Erie? And if so, if it passes them at or near grade.

Ans. I am acquainted with the place and manner. It passes at or near grade.

Q. Does the railroad at these crossing, or either of them, obstruct the free use of those streets as public highways?

Ans. It does not.

Q. Are you acquainted with the manner in which the railroad crosses Ash Lane, German and Holland Sts. in the city of Erie?

Are those streets improved at the point of crossing? If improved, would or not the crossing be similar to, and of as easy passage as Parade St.

Ans. I am acquainted with the manner in which they are crossed. I believe they are not improved. If they were improved I think the grade would be about the same as the crossing at Parade St.

Q. Could not the grade at those points of crossing be accommodated to the railroad as located without injury to the adjoining lots, or to those streets?

Ans. It could.

Q. State if you are acquainted with the manner in which the railroad crosses the Buffalo road at Mills'. And if so, whether it crosses at or near grade; and does the railroad at that point obstruct or impede the Buffalo as a public highway?

Ans. I understand and am acquainted with the manner of the said road crossing Buffalo road at Mills'; it crosses at or near grade, and I don't think it obstructs the free use of the Buffalo road as a public highway.

Q. State, if you know, the distance between cattle guard and cattle guard at that crossing; the distance in length and breadth of the Buffalo road occupied by the railroad there; what distance is it planked, and how; how far the house of Mills is from the north rail of the track; and how far is the fence of Mr. Wagner from the south rail; if you measured the same, and for what purpose?

Ans. The distance from cattle guard to cattle guard at the crossing is 864 feet, it may be 10 feet more. The distance in length of the Buffalo road there occupied by the railroad at the crossing is about 330 to 350 feet and from 8 to 10 feet in width. It is planked by planks on the ties lengthways, filling the space between the rails and one plank laid outside of each rail and for the distance of 310 feet in length. John H. Mills' house is 44 feet from the north rail of the track, and Gideon Wagner's fence is 35 feet south of the south rail. I made these examinations yesterday, for the purpose of ascertaining the true state of the crossing and testifying to the same.

Q. When teams and trains approach that crossing going in the same direction either east or west, state how far one (upon the Buffalo road) from the centre of the point of crossing can see the trains.

Ans. Travelling from the west east, both team and train can be seen west, I should think, for half mile. It might be seen the entire distance for half a mile. There might be a position within this half mile in the hollow of the 6 mile creek, where the person might not be able to see the train. Coming from the west on the top of the 6 mile creek hill, east of the creek, the train could be seen even further than half a mile, from any point between that and the crossing. That must be some 2000 feet or more west of the crossing.

I think a train going west might be seen by a person going west at any point east of the crossing, for at least three-quarters of a mile.

Q. When the teams and trains approach that crossing in opposite directions, state how far a person upon the Buffalo road, from the point of crossing, can see the trains either east or west, from the centre of the point of crossing.

Ans. A person going from the east to the west upon the Buffalo road, at any point east of the centre of the crossing from 900 to 1800 feet, can see the train 750 feet west of the centre of the crossing. A person standing at a point 350 feet on the Buffalo road east of the centre of the crossing, can see an engine from 2 to 3 miles, coming from the west. Going east on the Buffalo road, a person at a point 2380 feet west of the crossing can see an engine 730 feet east of centre of crossing. A person on the Buffalo road at a point 550 feet west of centre of crossing, can see the engine or train coming from 2 to 3 miles, and from any point within 300 feet east or west from the centre of crossing, a train could be seen as far as the eye can reach.

Q. When did you make these measurements and examinations, and had you a locomotive along to assist you?

Ans. Yesterday. We had a locomotive.

Q. Had you been engaged in the commission or forwarding business or otherwise at the Harbor of Erie, if so, when; did you while engaged acquire a knowledge of the source or sources, from which that business is principally derived, if so, state the same?

(Complainants object to this question, on the ground that it is leading and irrelevant.)

Ans. I was so engaged as a forwarding and commission merchant, and coal dealer in 1850. I did acquire while there a knowledge of the source, from whence the business of the harbor is derived. The business consists in coal, lumber and produce principally.

Q. State whether there has, during the last three years, been an increase in the business done at the harbor at Erie, and if so, in what it has principally been.

(Complainants object on the ground that it is irrelevant.)

Ans. I think the business has increased 25 per cent. each year, for the last 3 years, principally by the shipping of coal and lumber.

Q. State whether the E. & N. E. R. R. is not a road running in competition with vessels on the Lake during the season of navigation, and whether the construction of that road exclusively to the harbor, would add materially to the business of the harbor, and if not, why.

Ans. The E. & N. E. R. R. does run in competition with vessels and boats on the Lake during the season of navigation. I think its construction exclusively to the harbor would not add materially to the business of the harbor, because goods shipped east going by railroad or by lake, from Cleveland going east, would not change

from the cars to the Lake between Cleveland and Buffalo, neither would they change from the Lake to the cars between those points. Goods shipped from the east to the west, at any point east of Buffalo or Dunkirk if destined by the Lake, would be shipped at those ports, as it would save one transhipment, as the roads are now constructed, and could be carried cheaper on the Lake than on the railroad. They could be shipped as cheap from Dunkirk or Buffalo west to Cleveland, or any point west as cheap as they could be from Erie west to the same point. Produce shipped from any point west to the east, can be carried as cheap by boat from any point west to Buffalo or Dunkirk as they could to Erie.

Q. State whether produce of the west if destined for an Atlantic market, by the lake is not shipped on board a vessel at the port at which it reaches the lake first, and whether, if transported from that port in part by railroad to any other port, would not increase the expense, equal to the charge upon the railroad for that distance.

Ans. Produce would be shipped at the first port at which it reaches the lake. Produce shipped at Cleveland would go to Buffalo or Dunkirk by lake, at much less expense than it could be shipped to Erie by lake, and from Erie to Dunkirk or Buffalo by railroad. If the produce was shipped to Erie by railroad, and from Erie to Buffalo or Dunkirk by lake, it would cost the price of transportation by railroad from Cleveland to Erie, and of one transhipment more than it would cost to have shipped it by the lake.

Q. State whether, during the season when the lake is closed, or of dangerous navigation, it would not embarrass and be a tax upon eastern, southern, and western trade, commerce, and travel, to compel the same to descend to the harbor of Erie, and if so, why.

Ans. It would be an inconvenience and tax on eastern, western, and southern through trade, and travel to go to the harbor, because it would increase the distance, and would require more motive power the grade being heavier.

At 6½ P. M., Examiners adjourned until Monday, June 26, at 8½ A. M.

GEO. H. CUTLER,
JAS. SILL,
Examiners.

Monday, June 26, 8½ A. M., examination resumed, and Mr. Caughey being again on the stand, was cross-examined by complainants.

Q. Does not the railroad across Peach and Turnpike Streets, together with its use as used by the running of locomotives and cars thereon, obstruct and impede the free use of those streets as public highways?

Ans. The railroad as constructed across Peach and Turnpike Sts., does not obstruct those sts. At the precise time at which the locomotives and trains were passing the streets, it would, of course, pre-

vent teams from passing the streets crossing the railroad at that point.

Q. You say that at the crossing near Mills' at Harborcreek, the railroad track is planked for the distance of 310 ft., was it not in October, 1853, without such planking, only planked at one point some 111 or 12 feet in breadth, crossing the track at right angles or nearly so, and had it not been so without planking from the time of its construction up to that time?

Ans. I don't know.

Q. Is not the harbor of Erie a capacious one, and a better one than any other on the American side of Lake Erie (as distinguished from the Canada side) and would it not, if the facilities it offers were duly improved, be a more convenient point for the transaction of the business and commerce of the lake, than any other on the south shore of Lake Erie, west of Buffalo?

Ans. It is a capacious harbor, and one of the best on the lake, and affords facilities for doing any amount of business. It would be a very convenient point, perhaps the most convenient for the transaction of business.

Q. What is the price per ton for the transportation of freight from Erie to Buffalo, and what by railroad; what from Erie to Cleveland by lake, and what by railroad?

Ans. I believe heavy goods are transported by lake at about one dollar per ton to Buffalo, and about the same price by lake to Cleveland that it is to Buffalo. By railroad from Erie to Buffalo is from one dollar and fifty cents to two dollars per ton, and to Cleveland about the same price. These, I think, are about the rates.

Q. What is the cost of transhipment of a ton of freight from railroad to canal or lake boat at Buffalo, and what at Cleveland?

Ans. I am not well acquainted with the facilities of either of those points, and could not answer exactly. Where there is no carting to be done, I think it costs from 20 to 30 cents per ton to shift freight.

Q. Are you a stockholder in the E. & N. E. R. R. Co., if not now have you not been, and if so, when did you transfer your stock, and to whom?

Ans. I am not a stockholder. I was a stockholder, and transferred my stock to William M. Arbuckle, I think, in February, 1853.

Q. Have you not been an active participant in the late controversies between the city of Erie and citizens of Harborcreek on the one side, and the E. & N. E. R. R. Co. on the other, on the side of the Railroad Company; and have you not made voluntary affidavits to be used against the said city and the citizens of Harborcreek.

Ans. I have spoken against what I considered a lawless destruction of property belonging to the E. & N. E. R. R. Co., by citizens

of Erie and of Harborcreek. I have never made any affidavits in those cases.

Q. Have you ever been in the employ of the E. and N. E. R. R. Co.?

Ans. I have not been.

Q. What is the difference in the distance between the upper lakes and the ports of Erie and Buffalo?

Ans. I believe it is ninety-eight miles from Erie to Buffalo by lake.

Q. Does not merchandise destined for the west by the lakes generally pass on steam vessels, and are not sailing craft on the lakes much more exclusively confined to carrying the products of a farm, grain, fruits, coal, lumber, &c.?

Ans. I think that is so to a great extent.

Q. Is coal an article of commerce from Buffalo or Dunkirk to ports west on the lake except to a very limited extent?

Ans. All the anthracite coal used is shipped from Buffalo, or principally there, which is a heavy item of trade. Bituminous coal, I suppose, from my own knowledge, is not shipped to a great extent from Buffalo or Dunkirk. The anthracite coal trade is much less on the lakes than the bituminous. I can't tell how much less.

Q. Is not the lower portion of Lake Erie more dangerous of navigation in the fall of the year than the other portion of the lake?

Ans. I don't know that it is any more dangerous than other parts of the lake. I think it is not.

Q. What is the average time it takes a sail *a sail* vessel to go from Erie to Buffalo and return?

Ans. The average time of sailing might probably be 3 trips per week.

Q. Is not coal an article of commerce to a considerable extent from Erie west?

Ans. There is a large amount of coal shipped from Erie west.

Q. Is there such a thing as insurance on the cargo on the lakes? If so, does not distance of voyage and time of season increase the risk?

Ans. There is such a thing as insurance upon cargo upon the lake. Times of season would make more difference than distance. I suppose that the difference between one hundred and two hundred miles would not make any difference in risks, but for the whole chain of lakes it might make some difference, and probably would.

Q. As an abstract principle in procuring the insurance of cargo upon the lake, does not the rate of insurance increase in proportion to the length of the voyage?

Ans. As an abstract principle, it would. Insurance is the same from Buffalo to Erie that it is from Buffalo to Cleveland, but from Buffalo to Detroit, the insurance risk would be increased.

Q. From what source do you derive your knowledge of the rates

of insurance on the lake, and of the rule mentioned in your preceding answer?

Ans. From having been engaged in the shipping business at the harbor.

MILES W. CAUGHEY,

Sworn and subscribed before us, June 26, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

William L. Scott, produced by respondents, was sworn, and testified as follows: Reside in Erie, am 26 years of age, and engaged in the forwarding, commission, and coal business, at the dock at Erie.

Q. Are you acquainted with the manner in which the Erie and Northeast Railroad crosses Peach, Turnpike, and Parade Street, in the City of Erie, and whether it crosses them at or near grade?

Ans. I am acquainted with those crossings, and I think the railroad crosses those streets at or near grade.

Q. Does the railroad, at those crossings, or either of them, impede or obstruct the free use of them as public highways?

Ans. It does not, only at the actual time the trains are passing.

Q. Are you acquainted with the manner in which the railroad crosses the Buffalo Road at Mills', in Harborcreek, and if so, state whether it crosses it at or near grade, and does or not the railroad, at that crossing, impede or obstruct the free use of the Buffalo Road as a public highway?

Ans. I am acquainted with the manner of crossing. I should think that it crossed at or near grade. I should think that it was no obstruction to travel on the road, except at the time the trains actually passing occupy the road.

Q. State if you made examinations and measurements at that crossing; if so, when; what is the distance between cattle guards; what distance the railroad these in crossing occupies the Buffalo Road; the width of the railroad at that point; the distance of Mills' house from the north rail of the track of the railroad, and the distance of Wagner's fence from the south rail of the track of the road.

Ans. I have made measurement and examinations at that crossing the latter part of last week. I found, by actual measurement, between cattle guards, the distance of 864 feet. I cannot say the exact amount of road occupied by the railroad, but the distance planked is 310 feet. The distance from the north rail to Mills' house is 44 feet, and from the south rail to Wagner's fence is 35 feet. The width of road occupied by the railroad I should think seven and one-half feet.

Q. When teams and trains approach that crossing, state how far from centre of crossing one upon the Buffalo road can see the trains.

And. A man travelling west upon the Buffalo road, when he is

from 900 to 1800 feet east of the centre of the crossing, he can see an engine 750 feet west of the centre of the crossing. When within 300 feet east of the centre of the crossing, he can see an engine for from 1½ to 3 miles. A man travelling east upon the Buffalo road, when from 2300, 2500 feet west of the centre of the crossing, he can see an engine 550 feet east of the centre of the crossing. When he is 550 feet west of the centre of the crossing, he can see an engine for from 2 to 3 miles.

Q. When teams and trains approach that crossing coming in the same direction either east or west, how far can a person from the centre of the crossing see the trains either east or west?

Ans. A person standing on the centre of the crossing, can see them as far as the eye can reach either way. An engine and man travelling in the same direction, when the man is 150 feet from the centre of the crossing, on either side of the railroad, either east or west, he can see the engine from one to two miles.

Q. I wish you to state if you had an engine with you when you made these experiments.

Ans. We *did*.

Q. Have you been engaged in the forwarding and commission business at the harbor; if so, state for what length of time; and if so, whether you, while so engaged, obtained a knowledge of the sources from whence the business at the harbor is principally derived, and state those sources?

(Complainants object to above question as irrelevant.)

Ans. I have been engaged in the commission and forwarding business on the dock for the last 7 years. From my general observation of business being engaged in it, and from the annual return of the business done, I have obtained some knowledge of its sources. The commerce of Erie consists in coal, lumber, and staves, and to a very small amount in produce.

State whether during the last 4 or 5 years there has been an annual increase in the business done at Erie harbor, and about what that increase has been.

(Complainants object to above as irrelevant.)

Ans. In the last 4 or 5 years the increase in the article of coal, which is one of the principal items, has been equal to 25 per cent. a year, and in the article of lumber and staves, I should think it had been even heavier. In produce the increase has been from 10 to 12 per cent. There has been a gradual increase in merchandise.

Q. State whether the E. and N. E. R. R. is a road running in competition with vessels on the lake during the season of navigation, whether the construction of that road to the harbor at Erie would add materially to the business at that harbor; and if so, why?

(Complainants object to first branch of above question as irrelevant.)

Answer. The E. and N. E. R. R. is, to a certain extent, a competing line with steamboats on the lake. If it was extended to the

harbor of Erie, it would not increase the amount of business done there, in my opinion to exceed from 150 to 200 tons a year; less than a dray load a day. My reasons for saying so, are from the fact of reference to the local freight secured at the company's depot, from handling a fair proportion of the freights distributed by the road myself, and from the general acquaintance with the business of the road itself.

Q. State fully whether trade, commerce, or travel, coming from the east and designed for the west, or from the west and designed for an Atlantic market, or not during the season of navigation, shipped at the first port at which the lake is reached; and if so, why?

Ans. Trade when it strikes the lake, generally, or always takes the lake to the furthermost ports east, where it can have a direct connection with the eastern markets, or else it takes the railroad direct to those markets, from the point it strikes the lake. I have never known an instance of it being shipped part of the way by railroad, and part of the way by lake. It is the same way with regard to freight going from the east to the west. The cost of the transportation of a barrel of flour from Cleveland to Buffalo by lake, is at this time 15 cents; the cost by railroad from Cleveland to Buffalo, is 44 cents. In shipping a barrel of flour from Cleveland to Erie by railroad, it would cost 22 cents, and thence by lake to Buffalo 15 cents more; not considering the damage to the flour by transhipment, and the cost of doing so, showing a difference of at least 22 cents per barrel in favor of the lake. The same principle is good to all ports west of Cleveland (to Chicago), only the difference by railroad is much greater in proportion. The same may be said in regard to all freight, but the advantage in favor of the lake is greater on heavy freights.

(Complainants object to above question and answers as irrelevant.)

Q. State whether there has been an increase in the tonnage, arrivals, and departures at the harbor of Erie during the last 4 years. If there has been a decrease; state in what character of vessels, and why.

Ans. There has been a very heavy increase in the arrival and departure of sailing vessels fully equal to 25 per cent. a year. There is not probably the same number of arrivals and departure of steamboats at this time, as there was 4 years ago, owing to the fact of the manner in which business is done now, being different from what it was at that time. Four years ago, before the completion of the Michigan Central Railroad, and the Michigan Southern Railroad, and the Cleveland, Columbus, and Cincinnati Railroad, there were daily lines of steamboats leaving Buffalo for Chicago and intermediate ports. On the completion of these roads, which are competing lines to all ports west and south of Cleveland, these boats have been drawn off, and at this time in place of there being a daily line of

boats from Buffalo to Chicago as there was 4 years ago, which took from 15 to 20 boats to keep it up, we now only have 2 to 3, and these three stop in here as regularly as they did 4 years ago. Had we the same number of steamboats running to Chicago at this time as we had 4 years ago, in my opinion, we would have as many arrivals and departures. All steamboats to my knowledge now running on Lake Erie, exclusively with the exception of what is called the "through boats" (which boats stop at no point between the place of their departure, and the port bound for), stop here as regularly as they did 4 years ago. There are lines of "through boats" from Buffalo to Detroit, and from Buffalo to Monroe. These boats pass Dunkirk, Erie, Cleveland, Sandusky, and Toledo without stopping. There is a line of boats running from Buffalo to Cleveland without stopping, passing Dunkirk, and Erie. There are two lines from Buffalo to Cleveland, and Toledo, which stop at Erie, and one line from Dunkirk to Toledo stops at Erie.

(Complainants object to the above question and answer as irrelevant.)

Q. If the Erie City, Erie and Sunbury, and Erie and Pittsburgh Railroads were completed to the harbor at Erie, would they not create business making it necessary for a line of steamboats from Erie directly to western ports?

Ans. If the Sunbury and Erie, and the Erie City Railroads were completed, they would be competing lines with all railroad communication between the lakes and the seaboard, and to enable them to compete fairly, it would be necessary for them to have boats running to all those points west of Erie.

Q. State whether, during the period when the latter is closed or of dangerous navigation, it would not embarrass and be a tax upon eastern, western and southern trade and travel, to compel the same to descend to the harbor at Erie; and if so, why.

(Complainants object to the above question as irrelevant.)

Ans. I should say it would decidedly, from the fact it would increase the distance of transportation of freight, and on account of the very heavy grades that it would have to pass over in going down to and from the harbor, which would cause an increase in the expense of transportation.

Q. How is the lumber, staves, coal and produce, which you say constitutes the principal business done at the harbor, bro't to the harbor?

Ans. The coal is brought there entirely by canal. The lumber and staves, the largest proportion by canal, and some of the produce and lumber brought by wagons from the interior.

At 12½ M. examination was adjourned until 2½ P. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 2½ P. M. the examiners met, and W. L. Scott being again on the stand was cross-examined as follows:—

Q. Are you not a stockholder in the E. and N. E. R. R. Co'y; not now have you not been; if so, to whom and when did you transfer your stock?

Ans. I have been a stockholder in the E. and N. E. R. R. Co. I am not now, nor have I been since the winter of 1851. I then sold my stock to M. B. Lowry.

Q. Are you not a son-in-law of John A. Tracy? Was not your home, during the controversy last fall and winter, between the City of Erie and the citizens of Harborcreek and the E. and N. E. R. R. Co., at his residence? Was he not then, and is he not now, President of the company and holder of a large amount of its stock, and have you not been an active participant in said controversy on the side of the railroad?

Ans. I am a son-in-law of John A. Tracy; a greater portion of the time of the controversy, my home was at his residence. He is President of said company, and was a portion of the time last fall during the controversy. As to the amount of stock Mr. Tracy owns I know nothing about it. I never took any part in the railroad disturbances here, and said very little about them, with one exception, when Mr. Tracy's house was attacked by a mob, he himself being compelled to be absent for his personal safety. I assisted in defending the house, and also assisted the sheriff in arresting the parties who attacked it.

Q. Are there not more steamboats with a greater amount of tonnage now navigating the lake than there was 4 years ago? What is the increase or decrease?

Ans. I should be inclined to think there is a small increase of tonnage. I don't think I could give an accurate answer as to what would be the increase.

Q. Is not the harbor at Erie a capacious and better one than any other on the American side of Lake Erie, as distinguished from the Canada side, and would it not, if the facilities it offers were duly improved, be a more convenient point for the transaction of the business of the lake than any other west of Buffalo on the south shore of Lake Erie?

Ans. The harbor of Erie is as good as any harbor on the American shore. I don't understand what you mean by improvement of the facilities. If you mean the construction of the railroad to the harbor, I would say, if the Little Valley Railroad, and the Sunbury and Erie Railroad were completed, I think our harbor would afford equal facilities for doing business to any other point on the lake. The same remark would apply to the Pittsburgh and Erie Railroad.

Q. If the Sunbury and Erie Railroad, without the Erie City and Pittsburgh and Erie roads, was constructed to the harbor of Erie, and the Western Lake shore extended to said harbor, would or would it not invite such an amount of business to the harbor of Erie, as to

render a line of steamboats on said lake to run in connection with it?

Ans. The completion of the Sunbury and Erie Railroad to the dock would, in my opinion, cause a necessity for it to have a line of steamers to the different ports west on the lake. I can see no advantage the western railroad would have, by having a line of steamers running in connection with it, and it would not be necessary in my opinion. I don't think it, the western road, would cause a single boat to come into the harbor.

Q. Do not the councils by ordinance fix the grade of the st's, and do you know the grade so established by them at the point of crossing by the railroad; if so, how do you know it?

Ans. I believe the councils do fix the grades of the streets. I do not know what the grade of the streets are at the crossing of the railroad. I know the streets are level for some distance above and below the crossings, and that the crossings are very nearly level with the road, to the best of my knowledge.

WM. L. SCOTT.

Sworn and subscribed before us, June 26, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Samuel H. Selden, produced by the respondents, was sworn and testified as follows: I call my home at Lyme, Connecticut, I am 28 years of age, and a civil engineer, in which business I have been engaged for about two years and a half.

Q. State if you are acquainted with the manner in which the E. & N. E. R. R. crosses Peach, French, and Parade Streets in the City of Erie, whether it crosses them at or near grade, and whether at those crossings the railroad impedes or obstructs the free use of those streets as public highways.

Ans. I know the manner in which the road crosses those streets. It crosses Peach Street and Turnpike Street at grade. It crosses Parade Street at or near grade. In my opinion, it does not obstruct the passage of the streets.

Q. State whether those streets could be crossed by the railroad without interfering with the streets more than they now are interfered with.

Ans. I do not think the railroad could cross those streets in any better manner than it does.

Q. Are you acquainted with the manner in which the railroad crosses the Buffalo road at Mills' in Harborcreek, and whether at that crossing the railroad interferes or obstructs the free use of the Buffalo road as a public highway?

Ans. I am acquainted with the manner in which it crosses the

Buffalo road there. The crossing is at grade; the grade of the railroad does not impede the usual travel of the Buffalo road.

Q. State if you have made a survey and map of that crossing, of the crossing by the railroad, of the old Buffalo road east of that point, of the railroad and Buffalo road between the Six-mile Creek and the Harborcreek stations; if so, attach the same to your answer to this interrogation.

Ans. I have made such a survey and map. This paper marked "Exhibit D," and signed by the examiners and by myself, is such map.

Q. State whether what on your map you designate as "Old Road" south of the railroad is included within the fields and yard of Plara Elliot.

Ans. That portion of the map called the "Old Road," which is south of the land belonging to the railroad, and west of the road leading south, was, when the survey was made, included in the grounds of the adjoining house. I made the survey on the 19th of January, 1854. There was a fence between these grounds and the ground of the railroad.

Cross-examination resumed by Complainants.

Q. You say you have been engaged as a civil engineer two and one-half years, state how long you have been engaged a civil engineer on the railroad, and in what capacities and where you are now engaged.

Ans. I have been engaged in civil engineering on railroads for two years in the capacity of assistant engineer. For 18 months on the Buffalo, Corning, and New York Railroad, and 6 months on the Erie City Road. I am now engaged on the Erie City Railroad.

Q. Do you know how frequently the locomotives, trains, or cars pass Peach, Turnpike, or Parade Streets?

Ans. I could not tell the exact number of times they cross those streets each day.

Q. Does not the frequent passage of trains operate as an impediment to the constant and free use of said streets as a public highway?

Ans. So far as I have observed, the trains as they cross those streets named they do not offer any serious impediment to the free passage of the streets named.

Q. Who employed you to make the draft and map?

Ans. The Erie City Railroad Company, in whose employ I now am.

S. H. SELDEN.

Sworn and subscribed this 26 day of June, 1854.

JAMES SILL,
GEO. H. CUTLER,
Examiners.

C. F. Norton, produced by respondents, was sworn and testified as follows: I reside in Erie, am 33 years of age, and my business is the manufacture and forwarding of lumber from Erie.

Q Are you acquainted with the manner in which the E. & N. E. R. R. crosses Peach, Turnpike, and Parade Streets in the City of Erie; if so, whether it crosses them at or near grade, and if so, whether at those crossings, or either of them, the railroad impedes or obstructs the free use of those streets as public highways?

Ans. I am acquainted with the manner in which the railroad crosses those streets. It crosses at right angles, or nearly so, and at or near grade. I should think it does not impede or obstruct the use of these streets as highways.

How does the railroad cross the Buffalo road at Mills' in Harborcreek, is it at or near grade, does it or does it not obstruct the free use of the Buffalo road at that crossing?

Ans. I am acquainted with the manner in which it crosses the Buffalo road at Mills'. It crosses diagonally, and at very near grade. I think exactly so. It does not obstruct the free use of the road as a highway, except when trains are passing.

Q. State the distance between cattle guards at that crossing, the distance in length and breadth of the Buffalo road, occupied by the railroad at that crossing, the distance in length planked, and the distance from the north rail of the track to Mills' house, and from the south rail of the track to Wagoner's fence, how far a person on the Buffalo road, either east or west of the centre of the crossing, can see the cars from the point of crossing, both when the persons on the road and the cars are going in the same directions and in opposite directions; if you made an examination, when and for what purpose.

Ans. It is 54 rods between cattle guards, it may vary a few feet one way or the other. There is 310 feet of the crossing of the Buffalo road by the railroad planked, which I should judge all the Buffalo road occupied by the railroad, this 6 to 7 feet in width. From the north rail of the track to Mills' house is 44 feet, and from the south rail 35 feet to Wagner's fence. If you are standing 56 rods, and even more, east of crossing, on Buffalo road, you can see the engine when it is 46 rods west of the crossing. If you are 22 rods east of the crossing on the Buffalo road, you can see the engine 2 or 3 miles west of the crossing. At either of these points on the Buffalo road you can see the engine from one-half a mile to a mile east of the crossing, or any point up to the crossing. When a person is on the Buffalo road 140 rods and more west of the crossing, he can see the engine when it is 44 rods east of the crossing. If the person is standing 34 rods west of the crossing on the Buffalo road, he can see the engine for a mile or more when it is east of the crossing. At any point between this 140 rods and the crossing a person can see the cars when they are approaching the crossing from the west for a mile or a mile and a half. When at the crossing, a

person can see the cars either way as far as the eye can reach. I made the examination the latter part of last week with others, by request of John A. Tracy.

Q. State whether you have been engaged at the harbor of Erie, in the lumber business or not; if so, what length of time, whether you thus became acquainted with the principal sources of the business done at the harbor; if so, state the same.

Ans. I have been engaged in the lumber business at the harbor for 6 or 7 years, and have been at the harbor for the most of the time during the business season, for the last 3 or 4 years. I have been acquainted with the kinds of business done at the harbor for the last 3 or 4 years. The business is mostly the shipping of lumber, coal, staves and most kinds of produce.

Q. State whether, during the last 3 or 4 years, there has been an annual increase in the business done at the harbor, if so, about what that increase has been.

Ans. There has been an increase in the last 3 or 4 years of at least 25 per cent. per year in the coal business, and the lumber and stave business has, I should think, doubled in that time, the produce has increased, I should think, about 25 per cent. per year.

Q. By what means is the lumber, coal, staves and produce brought to the harbor of Erie?

Ans. About three-fourths of the lumber, nearly all the staves and all the coal is brought by canal. I should think one-half or perhaps more of the produce came by canal, although I am not so familiar with it. The other part of the produce, lumber and staves are brought from the interior by wagons.

Q. State whether the E. and N. E. R. R. is not a road running in competition with vessels on the lake during the season of navigation, and whether the construction of that road exclusively to the harbor would add materially to the business of the harbor.

Ans. The E. and N. E. R. R. runs parallel with the lake, and is doing a business which would come in opposition to business on the lake by vessels and steamboats. I should think its construction exclusively to the lake would not add to the business of the harbor at all.

Q. State why you say it would not add to the business of the harbor.

Ans. Any property that was to be shipped by railroad from this point, could go to the railroad as well now as if the railroad was built to the harbor. Any property that was shipped from the West to an Eastern market, it would be no object to land to take the railroad here, as there are points farther east than this, that property can be shipped to from the West at the same price that it can be to this port, to railroads running directly to New York and other eastern markets. Property going west from the east, if it is shipped by railroad at all, it is shipped at Buffalo or Dunkirk to its place of destination. If it is shipped by lake it is shipped to the

farthest point that it can get to by water. The E. and N. E. R. R. would be no convenience for travel at the dock.

Q. State if the Sunbury and Erie, the Erie City and the Pittsburg and Erie Railroads were completed to the harbor of Erie they would not add to and increase the business at the harbor of Erie, as the railroads leading into Buffalo, Dunkirk, Cleveland, Detroit and Chicago, leading from the country to the harbor at those respective towns increase the business of those towns.

Ans. The Sunbury and Erie Railroad, the Erie City Railroad and Pittsburg and Erie Roads are roads which, if built, will lead into the interior of the country from this port, and would make a large amount of business at this port, both for travel and the shipping of property from the East and West.

Q. State whether, during the period that the lake is closed or of dangerous navigation, it would not embarrass and be a tax upon Eastern, Western and Southern trade, commerce and travel, to compel the same to descend to the harbor at Erie, and if so, why?

Ans. It would be a great inconvenience during the season that the lake is closed, and during the season of dangerous navigation to trade and travel, to compel the trade and travel to go to the dock, on account of the very heavy grades getting to and going from the docks. It would make a greater distance by one or two miles, and make some very dangerous curves.

Cross-examined by Complainants.

Q. Do you know how often the cars or trains pass Peach, Turnpike and Parade street?

Ans. I do not.

Q. Would not the frequent passage of trains at those points obstruct the free and constant passage of the same?

Ans. While they were passing it would obstruct, and so would a 4 horse coach if it was passing in the same way.

Q. How great a grade would be necessary in descending to the dock?

Ans. I don't know what the grade would be. It would be very heavy.

Q. Do you mean to say that a 4 horse coach would obstruct as much as the cars, and would not the road be obstructed in proportion to the increased number of trains?

Ans. A 4 horse coach would obstruct about the same as an engine and one car, and the more times that the trains passed by the more it would be obstructed.

C. E. NORTON.

Sworn and subscribed before us, June 26th, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 6 P. M. examination adjourned until Tuesday, June 27th, at 8½ A. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

June 27, 8½ A. M., examiners met, and Hon. James Miles produced by respondents, was sworn and testified as follows: I reside in Girard Township, Erie Co., am between 62 and 63 years of age, and am a farmer.

Q. State whether you are acquainted with the manner in which the E. and N. E. R. R. crosses Peach, Turnpike, and Parade streets in the City of Erie, whether it crosses them at or near grade, and whether at either of those crossings it impedes or obstructs the free use of those streets as a public highway.

Ans. I am acquainted with the manner in which it crosses those streets. Peach and Turnpike streets are crossed even with the surface of the balance of these streets. Parade is crossed I think a foot or two above the surface of the balance of the street. The railroad itself is, I think of itself, no obstruction or injury to those streets. I drive over those crossings frequently, and it makes no difference. I have had once or twice to wait for a train to pass, it was up by the depot. I think I did not have to wait to exceed a minute at a time.

Q. Are you acquainted with the manner in which the Buffalo road is crossed by the E. & N. E. R. R. at Mills' in Harborcreek, if so, state whether it is crossed at or near grade, and whether the railroad at that crossing impedes or obstructs the free use of the Buffalo road as a public highway?

Ans. I am acquainted with it, that is, I have driven over it a few times. It is crossed at just about grade. It obstructs when a train is passing no other way. You can drive over it without any inconvenience.

Q. State how long you have resided in the county of Erie, whether you have been connected with the construction of railroads as a director or contractor, and whether you are acquainted with the harbor at Erie?

Ans. I have resided in Erie county about 59 years. I have been connected with railroads as a contractor on the Franklin Canal Company's railroad and a director of the same, the last year also as a director of the Erie & Sunbury railroad, from its re-organization until last February. I am acquainted with the harbor of Erie.

Q. State whether the E. & N. E. R. R. is now a road running in competition with steam and other vessels on the lake during the season of navigation, and whether the construction of that road to the harbor of Erie would add materially to the business of the harbor, and if so, why?

(Complainants object to the above question as being partly irrelevant, and matter of opinion.)

Ans. I consider them rivals to each other, and that the construction of the railroad exclusively to the harbor would make no material difference in the business of the harbor. My reasons are because if freight was shipped on the railroad, it would not be re-shipped on the lake at Erie, or if on the lake it would not be re-shipped on the railroad here, and it would make expense to make those re-shipments here. These are the reasons why it would be of no available use to the harbor.

Q. State whether the completion to the harbor at Erie, of the E. & N. E. R. R., excluding the present up-town connection, would or not add materially to the business of the harbor, whether any advantage the continuance to the harbor of Erie of that road might be to trade or to the harbor, could not be as well accomplished by extending a branch to the harbor, retaining the present up-town line, whether or not in the season when the lake is closed or of dangerous navigation, it would not increase the expense of trade and travel from the west to an eastern market, from the east to a western market, from the west to Philadelphia by the Sunbury and Erie Railroad when completed, and from Philadelphia west by the same road to compel all trade and travel to descend to the harbor at Erie, and if so, why?

(Complainants object to the above question as prolix, irrelevant in part, and leading and mere matter of opinion.)

Ans. I think the completion of the railroad to the harbor would not add materially to the business of the harbor, that it would be an injury to the railroad to exclude its up town connections. I think a branch road to the harbor would accommodate every business of the harbor which would have to be done there, and a large portion of the business which would have to be done here, would have nothing to do with the harbor, and would be much better accommodated by not having to go to the harbor, as to go there would add from one to two miles to the distance, besides a heavy grade in going to and coming from the harbor. I think it would increase the expense and risk too for the roads to run to the harbor while navigation was closed, would be so on all the roads, the Sunbury & Erie and all. The reason is, that running up and down a heavy grade and curve would add to the expense and distance, as the line up town is a straight line, and it would also add from one to two miles to the distance.

Q. State from what source or sources, the business done at Erie harbor and generally at harbors on the lake is mainly drawn, and how the trade and travel constituting that business, generally reaches those harbors.

(Complainants object to the above question for irrelevancy, and that it is a matter of opinion.)

Ans. The business done at Erie and harbors generally is brought

from the interior country. I think the business done at Erie harbor is mainly from the canal. Some is brought by teams, but it is principally from the canal. At other harbors, Buffalo, Dunkirk, Toledo, &c., it is from canals and railroads.

Q. State if the Sunbury & Erie, the Erie City and the Pittsburgh & Erie Railroads were completed to the harbor at Erie, would they not materially increase the business done there, and whether this would not be the same if the E. & N. E. R. R. were extended to the harbor exclusively or not, and if so, why?

(The last clause of the above question from the word "whether," objected to by complainants for irrelevancy and being matter of opinion.)

Ans. I think the completion of the Sunbury & Erie, the Erie City and Pittsburgh & Erie Railroads to the harbor at Erie would add to the business done there. I think the completion of the E. & N. E. R. R. to the harbor would not affect it in any way when those roads are completed; it would neither add nor diminish. The completion of the first named roads to the harbor would increase its business, because it would bring the produce of the interior country here to be shipped, and it would cause freight to be brought here to be shipped to the interior on those roads, and to Pittsburgh, New York and other places.

Cross-examined by Complainants.

Q. Are you a Stockholder in the Franklin Canal Company Railroad or Western Railroad?

Ans. I am a Stockholder in the Franklin Canal Company's Railroad.

Q. If the E. & N. E. R. R. were extended to the harbor exclusively, its present connection with the Western railroad being discontinued, would it not become necessary to construct the Western road to the harbor also?

Ans. I don't know that that would make it necessary. It becomes necessary under the late law which they have accepted, to make one within two years.

Q. Under the circumstances suggested in the preceding question, with what Eastern road could the Western road form a connection without going to the harbor, and how, if it could so, form such connection?

Ans. It could not form any connection now without it was the E. & N. E. R. R. If it was not for the late law, and the N. E. road refused to connect with them up town, then they would still have to go to the harbor.

Q. How far have you resided, and how far do you reside from the railroad crossing at Harborcreek and from Erie?

Ans. I reside somewhere from 18 to 19 miles from Erie and from 24 to 26 miles from the crossing in Harborcreek.

Q. About how far south of the Lake Shore (including the B. &

S. L. E. & N. E. and F. C. Co.'s railroads & C.) does the Lake Shore road run, and about how far from the harbor of Erie?

Ans. About a mile, it may be a little more or less.

Q. State whether at present it connects with any ports on the lake save Buffalo, Dunkirk and Cleveland.

Ans. I think not. It has no connections with any other ports on the lake except where railroads come in from the interior.

Re-examined by Respondents.

Q. State whether the Lake Shore road, as extended to Cleveland, runs to or connects with the harbor of Cleveland, or whether to tranship from cars to vessels at that port, drayage is or is not necessary.

Ans. It does not connect with the Harbor at Cleveland. The cars do not run alongside the docks where the vessels lie.

Cross-examination resumed by Complainants.

Q. Is not the Lake Shore Railroad at Cleveland constructed in part on piles or piers over the water, or what was the water of the lake or harbor at that point, and what is the height of the road there above the water, and is there not means there by which freight can be transhipped directly from railroad cars, to canal or lake boats without drayage?

Ans. After the Lake Shore Road descends the hill to about 8 or 10 feet above the water, it then runs on piles drove into the sand, and their depot is built on piles over the water, say about 8 or 10 feet above the water. I know of no place about the dock of this road where they re-ship without drayage. I never saw them re-ship from car to boat. There is none I know of which runs cars to the boats but the Pittsburg & Cleveland Railroad.

Q. How far is their depot (the Lake Shore Road's) distant from the point at which canal and lake boats can approach?

Ans. I think about 40 or 50 rods.

Q. Does not the Lake Shore Road start from the Pittsburg & Cleveland Railroad depot?

Ans. The Lake Shore Road runs to the passenger depot of the Pittsburg Road, also the Cleveland, Columbus and Cincinnati Railroad has their passenger depot in the same building. The Cleveland and Wellsville Road has a track running to the lake to a point where coal cars run and unload on to vessels when it is calm. The passenger depots of all the roads are in the same buildings.

JAMES MILES.

Sworn and subscribed before us, June 27, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiner.

William M. Arbuckle produced by respondents was sworn and testified as follows: I reside in Erie, am 43 years of age, and my business is the mercantile business in New York city.

Question No. 1, as put to Judge Miles, read over to witness, who answered as follows:

Ans. I am acquainted with the manner in which the railroad crosses those streets. I have noticed the manner. Peach and Turnpike streets I think are just at grade and Parade street nearly so. I do not consider them an obstruction to those streets or an impediment to the travel.

Question No. 2, as put to Judge Miles, read over to witness, who answered as follows:

Ans. I have noticed the crossing in passing there. I think it is at or near grade, and no obstruction to the free use of the public highway.

Question No. 3, as put to Judge Miles, read over to witness, who answered as follows:

Ans. I have resided in this county 43 years and have never been connected with the construction of railroads but am a director in the Erie City R. R. I am acquainted with the harbor at Erie.

Question No. 4, as put to Judge Miles, read to the witness, who answered as follows:

Ans. I think the E. & N. E. R. R. is a road running in competition with boats during the season of navigation. I don't think the construction of the E. & N. E. R. R. to the harbor would increase the business or commerce. Because I think that all freight shipped from the east to the west or from the west to the east takes the first port it reaches on the lake.

Q. No. 5, as put to Judge Miles, being read to the witness, he answered as follows:

Ans. I don't think the completion of the E. & N. E. R. R. exclusively to the harbor would add anything to its business. I think any advantage which the continuance to the harbor of Erie of that road might be to trade, or to the harbor, could be as well accomplished by extending a branch to the harbor retaining the present up town line. I think the expense would be increased somewhat to trade and travel were it compelled to go to the harbor at Erie. I can't say exactly how much it would be so increased. There would be some curves and heavy grades.

Q. No. 6, as put to Judge Miles, being read to witness, he answered as follows:

Ans. The business of Erie harbor is I think principally from the interior, in the shape of coal, lumber, staves, etc. At Buffalo the trade is a little different. There they have more produce from the west, and merchandise from the east to handle, than the harbor of Erie can have at present. As to the western ports I don't know as I can say. Sandusky and Cleveland I suppose to have a similar

kind of trade to Erie, produce from the south and merchandise from the east.

Q. Question No. 7, as put to Judge Miles, was read to the witness, who answered as follows :

Ans. I think the completion of the Sunbury & Erie, the Erie City, and the Pittsburg and Erie Railroad would very materially increase the business of the harbor for the reason that they are interior roads, but the E. & N. E. R. R. not being an interior road, parallel with the lake, does not bring to the harbor anything for transhipment, and would not increase the business done here.

(The above questions proposed, propounded subject to the same objections which were made by complainants, when the questions were proposed to Judge Miles.)

Cross-examined by Complainants.

Q. Have you ever been a stockholder in the E. & N. E. R. R., if so, when, and to whom did you transfer your stock?

Ans. I am not a stockholder now, I have been. I sold the last in March or April, 1853. I sold it at the stock board in New York. I can't say to whom, transferred it in blank.

You say that the lake shore road is a road running in competition with boats on the lake. Is not this a mere matter of opinion with you, and may they not, for aught you know, be running in combination with each other by private agreement, and dividing the profits?

Ans. It is a matter of opinion that they are running in competition. They may be running in combination. I don't know anything to the contrary.

Q. Is not the harbor of Erie a capacious one, and better than any other on the American side of Lake Erie; would it not if the facilities it offers were duly approved, be a better and more convenient point for the transaction of the business and commerce of the lake, than any other west of Buffalo, on the south shore of Lake Erie?

Ans. I think the harbor of Erie is a capacious harbor, and better than any other on the lake, or as good, perhaps. I don't know exactly what you mean by "the facilities it affords." If you mean its warehouses, docks, and anchorage, I think its facilities are ample, and more than what are necessary for the business done. If you mean the building of railroads from the harbor into the interior, the business might be largely increased and conveniently done. I think business might be as safely and conveniently done here as at any other point.

Q. If the Sunbury and Erie Railroad was constructed to the harbor of Erie, and the Western Lake Shore Road extended to the harbor, would it not, without the Erie City and the Erie and Pittsburgh Roads, invite a large amount of business at this point?

Ans. I think it would.

Q. Do not the Councils of Erie by ordinance establish the grade of the streets? Do you know the grade by them so established at

the point of the crossing of the street by the E. & N. E. R. R? If you say you know it, state how and by what means.

Ans. I believe the councils by ordinance agree upon or fix the grade of the streets; I don't know the grades there, except as the streets are finished; when the streets are finished through, I take it for granted that they are done at grade.

Q. State whether the region of country bordering upon Lake Erie, extending from Dunkirk to Cleveland, is not exceedingly fertile, well cultivated and improved, and much more productive than the interior country adjacent thereto.

Ans. I believe the country bordering on the lake shore from Dunkirk to Cleveland is exceedingly fertile, and, I think, better than portions of the interior country.

WM. M. ARBUCKLE.

Sworn and subscribed before us, June 26th, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Southmayd Stillman, produced by respondents, was sworn and testified as follows: I reside in Harborcreek township, Erie county; am a farmer, and 65 years of age.

Q. State how near to the crossing at Mills', in Harborcreek, you reside; how long you have resided there; whether you are acquainted with the manner in which the E. & N. E. R. R. crosses the Buffalo road at that point, and whether it obstructs the free use of the Buffalo road as a public highway.

Ans. I reside a little over a half a mile from the crossing on the Buffalo road; I am acquainted with the crossing; I should think the crossing is about on a level with the rest of the road; when the cars are not there the crossing does not interfere with the road at all; I have lived on the farm where I now reside about 18 years.

Q. State whether you are acquainted with the old Buffalo road, as it runs near Elliott's, if so, how often the railroad there crosses the same; whether a new road to avoid those crossings was built; by whom and when?

Ans. I am acquainted with the old Buffalo road near Elliott's; it crosses the Buffalo road, I think, twice; a new road to avoid those crossings was built by Mr. Wadsworth (I think employed by the company) before the grading of the railroad in that place.

Q. State whether this new road is better or worse, longer or shorter, of less or more grade than the old road at that point; whether it is exclusively used by the travelling public, and whether it has been improved or repaired by the township of Harborcreek; or the pathmaster thereof, and if so, when?

Ans. I should think it was a great deal better than the old road; it saves a hill that was in the old road; I should think it was shorter.

It is used altogether by the public; it has been improved by the pathmaster of Harborcreek. The bridge was new planked last winter; it was worn out there was so much travel upon it.

Q. State whether to your knowledge the map made by, and attached to the testimony of S. H. Selden in this case, designating part thereof as "new road," does not accommodate the travel as well as it was accommodated upon the old road?

Ans. I should think it does, and better.

Q. State whether that road designated as "old road," or part thereof, is not now enclosed in the yard or field of Plara Elliott?

Ans. Plara Elliott has now enclosed a part of it in his yard, and is now enclosing the balance.

At 12½ P. M. the examiners adjourned until 2½ P. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

2½ P. M. Southmayed Stillman being again on the stand, the examination in chief was continued.

Q. State whether you reside east or west of the new road you speak of, and how far your farm extends west of the east end of that road?

Ans. I reside east of the new road, and my farm extends west from the east end of the new road about 15 or 20 rods. The E. & N. E. R. R. Co. bought the land of me to build the new road upon.

Cross-examined by Complainants.

Q. What is the distance at the crossing, near Mills', from where the railroad going east first strikes the bounds of the Buffalo road to the point where it leaves it entirely?

Ans. I could not tell exactly the distance, but I think it probably 15 rods. It may be more, but I could not tell; it is but guess work.

Q. Was not that 15 rods which the railroad occupies, the Buffalo road at Mills' crossing, wholly without planking from the time of its construction up to the first of December last, except at one point where there was a narrow crossing at right angles, or nearly so, with the road?

Answer. They had a crossing planked near Mills' house, and another near Wagner's, though I am not positive as to Wagner's; the balance of the railroad I think was not planked.

Q. What was the extent east and west of that planking, its width east and west?

Ans. I should think that there were two tier of 12 foot plank in the crossing near Mills', making the crossing 24 feet wide, and I don't know as there was more than one tier in the crossing near Wagner's.

Q. Did not the rails of the track or the ties on the unplanked por-

tion of the crossing rise above the surface of the road, and there obstruct its free use as a public highway, and was it not a dangerous point of passing for loaded teams, particularly in the night time?

Ans. I should think that it was probable that on the unplanked portion of the crossing the rails did rise above the surface of the road. The ties were about even with the road. They had a good crossing, but where it was unplanked it was an obstruction. I don't know but what it was a dangerous point of passing for teams in the night time.

Q. Does not the railroad and its use with locomotives and trains of cars obstruct ths free use of the Buffalo road as a public highway in Harborcreek Township?

Ans. Yes, it is an obstruction.

Re-examined by Respondents.

Q. You have stated in your cross-examination that the location of the railroad and the use of it by locomotives and trains is an obstruction to the Buffalo road in the crossing at Mills'. State whether that is only whilst the locomotives and trains are passing over the Buffalo road at that point, or whether you intend to say that it is at all times an obstruction whether the cars and trains are passing or not.

Complainants object to foregoing question as leading.

Ans. I meant to be understood that it was an obstruction while the trains and locomotives are passing. When they are not passing it is no obstruction. Since the road was planked over, inside and out, it is no detriment to the road.

Re-cross-examined.

Q. You say it is no obstruction while the trains are passing, would a prudent man travelling on the Buffalo road with a loaded team, and on arriving near the point of crossing, discovering a train in motion either way a mile distant therefrom, venture to attempt the crossing until the train had passed, or when at what other distance might he prudently attempt to pass?

Ans. I should think if a train was a mile or half a mile off, there would be no risk in attempting to pass. I should think if the locomotive was 40 rods off there would be no great risk in crossing.

Q. How long does it take the train to pass over a mile of distance, how long would it take a loaded team to pass over 15 rods of distance, and would there be no danger of the horses becoming frightened or baulking, or being otherwise arrested while they were on the point of crossing, and train thus coming upon them?

Ans. I believe the lightning train comes something like a mile a minute. I believe the other trains don't go so fast. It would depend altogether upon the team, as to how long they would be going 15 rods. It might take a minute and it might take more. Some

horses would be frightened and some would not. If they got on the track when the cars were coming or close to them there would be danger.

SOUTHMAYD STILLMAN.

Sworn and subscribed this 27 day of June, 1854.

JAMES SILL,
GEO. H. CUTLER,
Examiners.

Bester Town produced by respondents was sworn and testified as follows: I reside Northeast bor., Erie County. I am 59 years of age, and my business until this spring has been merchandising.

No. 1 Q. Are you acquainted with the manner in which the E. & N. E. R. R. crosses the Buffalo road at Mills' in Harborcreek, if so, state whether it is crossed at or near grade?

Ans. I am acquainted with the crossing. It is about at grade, it may vary two inches, the thickness of a plank, though I may be mistaken.

No. 2 Q. State whether at that crossing the road is planked, and whether it impedes or obstructs the free use of the Buffalo road as a public highway.

Ans. It is planked or was the last time I saw it. It is not obstructed any more than any road must be. I mean by that, that when the cars are passing it obstructs.

No. 3 Ques. Are you acquainted with the manner in which the railroad crosses Peach, Turnpike and Parade Sts., in the City of Erie, if so, state whether the E. & N. E. R. R. crosses them at or near grade, or whether it impedes or obstructs the free use of these streets as public highways?

Ans. I am acquainted with those crossings. Peach and Turnpike streets are passed at about grade. The railroad passes Parade above grade, but on each side of the railroad it is even. I should think the railroad did not obstruct those streets except when the cars run.

No. 4 Q. How long have you resided in Northeast township or borough, and have you not had occasion by your teams frequently to use the Buffalo road between Erie and Northeast since the construction of the E. & N. E. R. R., and if so, have you experienced any inconvenience therefrom?

Ans. I have lived in Northeast township and boro. within a few days of 30 years. I have frequent occasion to use the Buffalo road since the construction of the railroad. I have had a team going to Erie for goods and salt, and have never experienced any inconvenience to my knowledge.

Cross-examined by Complainants.

Q. State the distance of your residence from Erie, and also the distance from Harborcreek crossing.

Ans. I live at what is called 15 miles from Erie and something over 8 miles from the crossing in Harborcreek; I live on the Buffalo road.

Q. At the crossing of the Buffalo road by the railroad in Harborcreek, what is the distance from the point where the railroad first enters upon the Buffalo road to where it leaves the same?

Ans. It crosses the railroad in a diagonal direction. I have never measured the distance; as near as I can recollect I would not think it more than from 250 to 300 ft., I would think it somewhere in that vicinity.

Q. State whether from the time of the construction of the railroad up to last December, the railroad was not throughout the distance from where it entered upon the Buffalo road to where it left it at said crossing, whatever that may be, wholly without planking except at one narrow point, crossing the track at right angles, what the width of that planking at that point was, and whether throughout the residue of the track at the crossing, the rails did not project above the surface and grade of the road and obstruct its free use as a public highway, except where it was planked.

Answer. So far as I can recollect, it was not planked the entire distance. I can't say how much was so. From the time the road was built, until the last time I was along there before last December, it was not planked through the entire distance. Where the road was not planked I think the rails projected a very little above the surface. I don't think the rails projected enough where it was unplanked to obstruct so as to do any material injury.

Q. You say you had a team that passed along the road considerably. Did you drive it yourself, or did some other person?

Ans. I did not. I have been with it once or twice, but generally it has been driven by another person.

Q. Was not your teamster Mr. Wilson Jones, who was here to be examined as a witness in this case?

Ans. His name is Wilson Jones. He started to come to be examined.

Q. Were you ever at the point of crossing at Mills' in a private carriage or conveyance when the cars were crossing over the road at the same time, or did you ever see anybody in the act of crossing along there when the cars were passing? If so, state whether or not there was any difficulty in consequence of the carriage and cars passing at the same time.

Ans. I never was there when the cars crossed, but have been near there when the cars crossed. I cannot say how near I was. I held up when I saw the cars coming. I never saw any one crossing the road when the cars were passing, but I have seen people near there waiting for the cars to pass. I have seen horses jump and dance as if they were frightened, but I never saw any accident there.

Q. You say the road as now planked is no obstruction, have you seen it planked?

Ans. I have not crossed it this spring with a team. I never saw it when it was all planked.

Q. You have given an opinion that the superstructure of the road itself is no obstruction to the public highway. Is not the road together with its use by locomotives and trains as used, and the delay it thereby causes in compelling people to wait until trains have passed, an obstruction to the free use of the Buffalo road as a common public highway?

Ans. While the trains are passing it is an obstruction and while people are waiting (seeing cars in the distance) for them to pass by.

Q. Are you a stockholder in the E. & N. E. R. R. company, and if not, when and to whom did you transfer your stock?

Ans. I am not. I have been a stockholder; I sold my stock to Wm. M. Arbuckle. It was either one year ago last fall or two years ago last fall.

BESTER TOWN.

Sworn and subscribed before us June 27, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

E. H. Davidson produced by respondents was sworn and testified as follows: I reside in Northeast township, on the Buffalo road, am a farmer, and 50 years of age.

Q. No. 1, as proposed to Bester Town, was read to witness who answered as follows:

Ans. I am acquainted with it, it is crossed very near at grade.

Q. No. 2, as proposed to Bester Town, was read to witness, who answered as follows:

Ans. I don't know as I have crossed it this spring. I crossed it last season, and it was then planked in two places, the east crossing towards Wagner's was I *was I* think one tier of 16 feet plank, the other two were 16 feet plank, making a crossing of 32 feet wide. I think the railroad at that crossing does not obstruct except when the cars are upon the track. I don't see why it should.

Q. No. 3, as proposed to Mr. Town, was then read to the witness, and he answered as follows:

Ans. I don't think I am well enough acquainted with those crossings to make any answer about it.

Q. No. 4, as proposed to Mr. Town, was read to Mr. Davidson, who answered as follows:

Ans. I have lived almost 39 years in the town. I have frequently travelled the Buffalo road with my team—last season I travelled it a good deal. I never experienced any inconvenience from the crossing of the E. and N. E. R. R. except once—I might say I did once. I had to stop for 2 or 3 minutes for the cars to pass.

Cross-examined by Complainants.

Q. State the distance of your residence from the crossing of the Buffalo road by the railroad at Harbor Creek.

Ans. About 5½ miles.

Q. Do you know the length of the Buffalo road occupied by the E. and N. E. Railroad at the said crossings?

Ans. I never measured it or saw it measured. I should think it about 20 rods it hits the Buffalo road.

Q. Throughout the unplanked distance of the crossing, did not the rail of the track project above the surface of the road, so as to obstruct the free passage of the unplanked part by a loaded team, and was it not dangerous for loaded teams passing along after dark and missing the planked crossing?

Ans. I never noticed so particularly how it was between those crossings, no more than to drive over. I would not be willing to give an opinion upon it.

Q. Was there not danger for some teams in attempting to pass there of being frightened or baulked, or otherwise stopped in that 20 rods, and having the cars come upon them, and would not teams for that reason be delayed there, and would a prudent man with a loaded team, seeing a train in motion a mile or more off, attempt to cross there until the train had passed by, and how long would it take a loaded team ordinarily to pass through that 20 rods of distance?

Ans. I don't think there is any necessity of a man getting up to the point of crossing with a scary team when the cars are coming. He might be delayed while the cars would pass, that would be a matter of course, for he can see the cars a sufficient distance so as not to give any trouble. I think a prudent man, seeing the train a mile off, would stop until it had passed. It might take a loaded team 3 minutes to pass the 20 rods. Any team could walk that distance in that time.

E. H. DAVIDSON.

Sworn and subscribed before us, June 27, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

W. L. Catlin, produced by the respondents, was sworn and testified as follows: I reside in the township of Northeast, I am 33 years of age, and a farmer and distiller.

Q. Are you acquainted with the manner in which the E. and N. E. R. R. crosses the Buffalo road near Mills' in Harborcreek township? If so, does it pass the same at or near grade, and does the railroad at that point impede or obstruct the free use of the Buffalo road as a public highway?

Ans. I am acquainted with that crossing. It crosses at near

grade, I should think. It has never obstructed me or my teams. I should think it was not an obstruction any more than any other railroad crossing.

Q. State whether you are acquainted with the manner in which the E. and N. E. R. R. crosses Peach, Turnpike and Parade streets, in the city of Erie, whether it crosses them at grade, and whether it obstructs the free use of them as public highways.

Ans. I am acquainted with those crossings, have crossed those streets a number of times. It crossed them at near grade. It must obstruct at the time the cars are passing.

Q. State whether at any other time than when the trains are passing it is an obstruction.

Ans. I should think not.

Q. State whether, since the construction of the E. and N. E. Road, you have had occasion to travel with teams on Buffalo road between Erie and Northeast, and if in thus passing, you found that the E. and N. E. Road obstructed or not the said streets or the Buffalo road.

Ans. I have had occasion to cross them a number of times, and to travel a number of times between Erie and Northeast on the Buffalo road. I never found it any obstruction.

Cross-examined by Complainants.

Q. You state that Parade street is crossed at grade by the railroad, or nearly so; do you mean to re-assert that fact in the answer to this question? If not, how far is it from it?

Ans. I don't know *not justly*, it is near grade. I should think that as the road was there before the railroad was built, the top of the iron is about 2 feet above it as it was.

Q. Do you know whether the city of Erie has established the grade of Parade street at any point?

Ans. I do not.

Q. State how often you have travelled or driven a team by and along the crossing at Harborcreek within the last year?

Ans. I should think I had been across there a number of times when the stages were running. Probably I have been over it with a team 20, 30, or 40 times, and my team has been over it, without me, about 300 times in the last year.

Q. Did you ever happen there with a team at the time that the cars were crossing the road? Did you not have to delay while they were passing, and have you not seen other persons waiting until the cars passed?

Ans. I have been there with a team when the cars were crossing. I recollect of being there particularly once. I waited and saw others wait.

Q. Have you when you come to Erie, and go with a team, do you come into town and go away from town, by going out by Peach or Turnpike Streets?

Ans. I sometimes come in one way and go out the other, sometimes don't come in or go out on either of them.

Q. In coming from Northeast into Erie, do you not generally come into town by Parade Street, and is not that the most usual and general way of returning? If not, state what street you usually come in upon and go out upon.

Ans. I do if I have a load come in on Parade Street. I should think it was not my usual way of returning. I go out oftener on Peach. My business, as a distiller, calls me frequently to this place. I go out on the streets that are most convenient.

Q. State how long you have resided in Erie County, and where you resided before you came to this country?

Ans. I have resided a little over 4 years in this county. I resided some three years in Chautauque County, New York, on the edge of this county.

Q. Are you or have you been a stockholder of the E. and N. E. R. R. Co.? Are you in the employ of the company, and in what way?

Ans. I am not a stockholder, nor have I been. I am not, and never have been in their employ.

Q. State how far you reside from the point of crossing at Harborcreek, and how far from Erie.

Ans. I reside 17 miles from Erie, and about 9 miles from the crossing.

W. L. CATLIN.

Sworn and subscribed before us, this 27th June, 1854.

GEO. H. CUTLER,
JAMES. SILL,
Examiners.

William Griffith, produced by respondents, was sworn, and testified as follows: I reside in Northeast Borough, I am 38 years of age, and am a farmer.

Q. Are you acquainted with the crossing of the Buffalo Road at Mills', in Harborcreek, by the E. and N. E. R. R.? If so, does it cross at or near grade, and does it obstruct or impede the free use of the Buffalo Road at that point as a public highway?

Ans. I have been frequently at the point before and since the track was laid. It crosses at grade. I think it does not impede or obstruct the Buffalo Road.

Q. Are you acquainted with the manner in which the railroad crosses Peach, Turnpike, and Parade Streets in Erie? Does it cross them at or near grade, and does it, at the point of crossing those streets, impede or obstruct the free use of them as public highways?

Ans. I am acquainted with those streets; am not familiar with the names, but know them all; have been at the crossings of all; it passes them all at grade except Parade Street, which is raised about

two feet. I should think it did not impede or obstruct their free use as public highways. The track is put down in the ordinary manner, and a prudent driver should hold up a little as he passes.

Q. State if the rails at the several points of crossing could be laid, to be a less obstruction than they are.

Ans. I am not accustomed to doing that sort of work, but think it is done in the best manner it could be. I think I never saw any better.

Q. State whether the E. and N. E. R. R. road, at the borough of Northeast, does not cross the public road leading into the said borough from the south, precisely similar to the crossing of Peach and Turnpike Streets in the City of Erie?

Ans. The crossing is put down the same there as here, except that it is put down at three feet below grade. The road crosses at the divergence of two streets leading into the bor.

(The foregoing question objected to by complainants, as leading and irrelevant.)

Cross-examined by Complainants.

Q. How often have you been in the habit, monthly or weekly, of passing these crossing places in a private conveyance?

Ans. I have passed there six or eight times in a year ordinarily. I usually come in by one street and go out by another.

Q. When you say the railroad at neither of these crossings is an obstruction to the free use of the road or streets, do you not mean that the superstructure of the road alone is not an obstruction to their free use?

Ans. I refer to the track of the road without any relation to the cars.

Q. Please state how far you live from Erie and from the crossing at Harborcreek.

Ans. I am 15 miles from Erie and 8 or 9 miles from Harborcreek crossing.

Q. Is not the point at which the railroad crosses the road or street near Northeast entirely outside of the village, and is it not outside of the borough limits?

Ans. It is within the borough limits, and passes as many buildings as it would anywhere, except on the Buffalo road. The village is mainly built on the Buffalo road. The railroad is about 90 rods south of the Buffalo road, at the village of Northeast.

Q. Is there not a large number of dwellings and places of business north and south of and near to the crossing place of Peach and Turnpike Streets by the railroad?

Ans. The ground there, with the exception of the streets, is mostly occupied by buildings, including railroad buildings.

Q. State the distance which the railroad occupies the Buffalo road at the crossing at Harborcreek.

Ans. I never made any examination, but should think about 200

feet. I mean that portion that is included within the boundaries of the road. I am not positive at all.

Q. Was not the track, when you last saw it, throughout the distance it so occupies the road without planking, except a few feet of plank to cross the track at right angles? or if you say more of it is planked now, state when it was planked.

Ans. It is planked for a considerable distance now, covering the space ordinarily travelled. I am unable to say when it was so planked. It was formerly planked so as to form two places of crossing for the highway. I am not certain, but think it was the width of two 12 feet planks.

Q. Did not the rails at the unplanked portion of the road project above the surface of the road, and to what height, and did they not obstruct the free use of that portion of the crossing as a public highway?

Ans. I think the top of the rail was nearly on a level with the earth, but it was very inconvenient passing over the rail with a loaded team when it was not planked.

Q. Were not teams liable to miss the planked crossing after night, and liable to incur difficulty and danger on the unplanked portion of the crossing, and was not the whole distance planked since April last?

Ans. Teams would be liable to miss the planked part in a dark night. I do not know as they would incur any danger or serious difficulty; it would jolt. I should think it had been planked since the last snows.

WM. GRIFFETH.

Sworn and subscribed before us this June 27, 1854.

JAMES SILL,
GEO. H. CUTLER,
Examiners.

At 7½ P. M. examiners adjourned to Wednesday, June 28, at 9 A. M.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Wednesday, June 28th, 9 A. M., examiners met.

Respondents offer in evidence the 14th section of an Act of Assembly of this commonwealth, of the 14th April, 1852, entitled inter alia, an act to incorporate the Northeast Cemetery in the County of Erie.

William Brewster, produced by the respondents, was sworn and testified as follows: I reside in Erie, am 26 years of age, and am engaged in banking business at present.

Q. State whether you assisted in making the surveys, levels,

notes of levels, maps, and profiles of the E. & N. E. R. R. Co., now on file in their office; if so, in what capacity? State whether they are accurate or correct or not.

Ans. I did assist in making such surveys, levels, notes, profiles, &c., of the E. & N. E. R. R. I was so employed from April, 1849, to the spring of 1852. I commenced as rodman, was about a year and a half as rodman, and the balance of the time 2d assistant engineer. Those maps, profiles, surveys, &c., are correct.

Q. State whether in making these surveys, &c., of the E. & N. E. R. R., you found a difference in elevation between the east and west banks of the 12 mile creek; if so, what that difference was, and whether it extended from where the railroad is located to the lake.

Ans. There was a very great difference in the elevation of the banks. What that difference was I cannot say. I know that the difference extended from the railroad to the lake, or nearly so. From my present recollection, I should think we ran into a bank which would cause an excavation of from 60 to 70 feet in depth.

Q. In constructing a railroad from Erie east to the New York line, how could that elevation best be overcome?

Ans. It would depend entirely on the surface of the country along the lake shore.

Q. In constructing a railroad from the harbor at Erie, connecting with the present road 6 or 8 miles east of Erie, or at the 12-mile creek, or at the 16-mile creek, state what east and west roads it would cross, and whether it would or not cut the farms more or less obliquely than on the present route, and whether the grade would be less or more than on the present line?

Ans. In constructing the road by either of the proposed routes it would cross the Lake road and the Buffalo road; it would cross them obliquely. It would cut the farms more obliquely than by the present route. The grade would be more than on the present line.

Q. State how the present line of the E. & N. E. R. R. accommodates the business of Erie, and along the line, and the country doing business at the several stations thereof.

(Complainants object to above question as irrelevant in part.)

Ans. I think the road could be placed in no better position, and no better location could be made of the road for the business of the country through which it passes.

Q. Are you acquainted with the manner in which the North E. R. R. crosses the streets in Erie, if so, whether it crosses them at or near grade, and whether it impedes or obstructs the free use of them as public highways?

Ans. I am acquainted with the streets which the railroad crosses at the point of crossing. Some of the streets it crosses at grade; Peach and Turnpike Streets it crosses at grade. It crosses Holland, German, and Parade Streets and Ash Lane above grade. State and French Streets are crossed by bridge above grade. I do not think the road obstructs travel or impedes the street on Peach

and Turnpike, State and French Streets. Parade Street I do not think it obstructs. Holland and German have not yet been opened, but if they were I do not think the road would be any obstruction. Ash Lane has about the same grade as Parade Street, and I don't think the road would be any more of an obstruction on Ash Lane than on Parade Street.

Q. Are you acquainted with the crossing of the Buffalo road by the railroad at Mills, in Harborcreek? if so, don't it cross at grade, and does it obstruct or impede the free use of the Buffalo road as a public highway?

Ans. I am acquainted with the crossing there, *crossing there.* It is about at grade. I do not think it obstructs or impedes the free use of the Buffalo road as a public highway.

Q. Did you assist to take the levels at the point where the railroad crosses the streets in Erie, and the Buffalo road, of which you have testified above?

Ans. I did.

Cross-examination by Complainant.

Q. Did you make all the levels and notes of the levels and profiles in the office of the E. & N. E. R. R. yourself?

Ans. I assisted in making them all.

Q. Who made them, if you did not make them yourself, and how can you now say without qualification that they are all correct?

Ans. They were made by Mr. Camp, James C. Reed, Wm. W. Reed, Jr. (then), and myself, from notes taken on the surveys, and I considered them to be correct.

Q. Were not the levels, notes and profiles taken and executed by the orders and directions of the chief engineer and those above you in official position?

Ans. They were.

Q. Who was the chief engineer of the road and who the first assistant?

Ans. During the location Mr. Courtright was chief engineer, James C. Reid first assistant. During construction Mr. Camp was chief engineer and Mr. James C. Reid first assistant.

Q. Was not Mr. Camp an engineer on the road, and engaged in making surveys for a location previously to its final location by the board?

Ans. The general location had been made by Mr. Courtright, and Mr. Camp finished the location, straightened the line, and so altered it as he thought to be the best for the country through which the road passed.

Q. Do you not know that Mr. Camp proposed and surveyed and reported a different line from the one adopted, crossing the Buffalo road but once, which was refused to be accepted by the board?

Ans. I know there were several surveys made about the Buffalo road at their crossings by the railroad, but whether they were sub-

mitted to the board and refused by them I do not know. They were made both by Mr. Camp and Mr. Courtright.

Q. What is the maximum grade of the railroad between Erie and the 12 mile creek? State the same as nearly as you can.

Ans. Fifteen feet per mile is I think the maximum grade.

Q. How far does the elevation which you speak of east of the 12 mile creek extend south? Does not the railroad pass through the southern end of it?

Ans. The elevation continues south of the railroad some distance on each side of the railroad, the elevation is greater than where the road passes.

Q. What is the addition to the grade west of that elevation made to it, by passing through the same?

A. I am under the impression that the grade continues on the same east until you get to the summit, which is about two miles below Northeast. There is no increase in grade in passing the summit.

Q. What is the maximum grade of the E. & N. E. R. R.?

Ans. I think the maximum grade is about 15 feet to the mile.

Q. Did you ever calculate mathematically the elevation you speak of east the 12 mile creek, so as to enable you to say that it is over 60 feet?

Ans. I don't know that I did. I only know the fact from levels taken at the time by others and myself. My impression is that it is 60 or 70 feet, and the farther you went the deeper it became.

Q. Did not the elevation decrease near to the lake?

Ans. I think it did somewhat.

Q. Are not Peach, Turnpike, State, French and Parade streets the principal streets leading from the country into the city of Erie, and more used than any other?

Ans. I think they are.

Q. Would not the terminus of the E. & N. E. R. R., at the harbor of Erie and extending thence east and connecting with the present line some 6 or 8 miles below, avoid the crossing of those streets altogether?

Ans. It would if the terminus of the road was east of those streets.

Q. If the terminus of the road was at the harbor and west of those streets, would it naturally cross those streets, or would it continue eastwardly along or near the border of the harbor, passing north of any travelled portion of said streets?

Ans. It would cross the streets at the border of the bay, whether it crossed any travelled portion or not would depend on whether the depot was on the shore or out in the harbor; by harbor I mean the docks.

Q. If the depot was on the shore of the harbor west of Peach, would the railroad cross any travelled portion of Peach, Turnpike, Parade or French Streets?

Ans. The road would not touch Turnpike Street. It would cross the travelled portion of French Street, but would not cross the travelled portions of Parade or Peach Streets.

Q. Would it necessarily cross any travelled portion of French Street, or might it not cross north of any travelled portion thereof?

Ans. By avoiding the lake shore it could.

Q. You were asked if it would not naturally cross north of the travelled portion of French Street; state whether you decline answering that question, or if you cannot answer it.

Ans. I cannot answer the question any more explicitly than I have.

Q. If it crossed along by the margin of the bay under the bank as you have spoken of, what part in extent of the travelled portion of French Street would be north of where the railroad would cross it?

Ans. I think from one to two hundred feet in length.

WM. BREWSTER.

Sworn and subscribed this 28th of June, 1854, before us.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

William Ritchie produced by respondents, was sworn, and testifies as follows: I reside in Erie; am 34 years of age; and a carver, carpenter, and joiner.

Q. Have you made a plan or model of the crossings of the Buffalo road by the E. and N. E. R. R. in Harborcreek township; if so, identify the same, and state whether it is an accurate and truthful representation of the crossing of the Buffalo road, showing the old Buffalo road, the new road made by the company, with the depression and elevation east and west of the 6 mile creek upon the line of the railroad, and upon the old line of the Buffalo road; and state the scale upon which the model is made?

Ans. I have made such plan or model. This plan marked "Exhibit E," and signed by the examiners and myself, is such plan or model. It is an accurate and truthful representation of the crossing of the Buffalo road by the railroad. The scale is 100 feet to the inch. The representations of the crossing of the Buffalo road, the old Buffalo road, the new road made by the company, with the depressions and elevations, are correct, as far as the surface is concerned, and all elevations and depressions over 3 feet; but for depressions, or elevations of less than 3 feet, the measure being only about one-fiftieth part of an inch. I found it impossible to represent them accurately. Where it is marked "former road," it is 3 feet higher than indicated on surface of model on the ground, but not laid down on the model. The whole thing is a correct and truthful representation, and practically correct.

Cross-examined by Complainants.

Q. How do you designate the portion of the old or former road on this board occupied exclusively by the railroad?

Ans. I designate it by dotted lines, beginning at the west line of the letter "N" in the word "new," and brought from there by dotted lines to connect with the part marked "former road," and from there by the dotted lines to the portion marked "OLD road."

Q. State, if you please, the precise point on the board where what you call the "new road" begins, and where it ends.

Ans. It is indicated by the angles in the new road, and the dotted lines of the old road.

Q. State, if you please, where you got the profile of what you have marked along here on the model as "proposed new road," and by whom proposed.

Ans. I was requested to lay it down by Mr. Courtright, who stated to me that it was a line of road that had been offered to the people of Harborcreek by some one having authority to make such offer; Mr. Dennis or some one having such authority from where it intersects the Buffalo road west of the 6 mile creek, to where it intersects the old Buffalo road at the word "old." This "proposed new road marked No. 2," was directed by Mr. Courtright to be laid down as a proposed new road, which might obviate all objections that might be made.

Q. State whether the scale is applicable to the width of the model, as well as the length.

Ans. It is applicable to the width as well as the length, and to the whole thing, except the small elevation and depressions (less than 3 feet).

Q. State, if you please, and mark, if you can, where Besley's, or the Harborcreek station is.

Ans. It is east of Elliott's run 200 to 400 yards, somewhere about that distance. I could not say, as I took no measurement.

Q. Are you acquainted by travel, or otherwise, with the Buffalo road; if so, state whether the owners of land along it have not generally made their dwelling improvement, such as houses and barns adjoining and near the road?

Ans. I am acquainted with the road shown on this plan. They are nearly adjoining the road, that is, those that have built there, some are back of course.

Q. Would not the "proposed new road No. 1," run back of or north, of the houses as they are situated along the Buffalo road at present?

Ans. It would run back of one to my knowledge; no more to my knowledge.

Q. Did you make this plan according to instructions, or from a view of the ground; if the latter, as a representation of the ground,

why did you not make the buildings and improvements occurring along either road?

Ans. I made it according to instructions and a view of the ground. Being directed to make it I went and viewed the ground. I viewed it three times. It never occurred to me to do anything but to mark the roads and their intersections.

Q. Was any one of the railroad company with you at the time you viewed the ground, or any body on their behalf, and if so, who?

Ans. There was none of the company nor none in their behalf. I requested Mr. Johnson to go along to assist in taking the measurement. He went with me.

Q. Is not Mr. Johnson an attorney at law, and as you understand, the editor of a newspaper here? and if so, how did you come to ask him to go out of town to assist you in taking the measurement?

Ans. I believe he is both, he is reported so. He and I are very friendly, and knowing him to be a good engineer, I requested him to go down with me. I lived at his house at the time.

Q. Where, from what source did you get the exact location and width of the old Buffalo road?

Ans. I measured it.

Q. Did you know the width and location of the Buffalo road as established by the legal authorities?

Ans. I did not only as I found it. I laid it down on this plan. I measured its width between the fences.

WILLIAM RITCHIE.

Sworn and subscribed before us, this 28th day of June, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

At 12½ P. M. examiners adjourned until 2½ P. M.

JAMES SILL,
GEO. H. CUTLER,
Examiners.

2½ P. M. Examiners met, and B. L. Doing produced by respondents, was sworn and testified as follows: I reside in Harborcreek, am 44 years of age and a tanner.

Q. State whether you are acquainted with the manner in which the E. & N. E. R. R. crosses the Buffalo road in Harborcreek, if so, whether it crosses at or near grade, and whether it obstructs or impedes the free use of the Buffalo road as a public highway.

Ans. I am acquainted with it, I reside about half a mile from it a little off from the Buffalo road. It passes the Buffalo road about at grade; I was there yesterday. I don't think it obstructs

the free use of the Buffalo road as a highway except when the cars are upon it.

Q. State if since the construction of the railroad you have had occasion frequently to pass along that road with a team.

Ans. I have had occasion more or less every year. I have owned a team ever since I have been there.

Q. State whether you know of an alteration in the Buffalo road east of that crossing and near Elliott's, whether a new road has been constructed or not, if so, whether the new road is as good or better than the old, and whether since the construction of the new road, it has been worked or repaired by the authorities of the township.

Ans. There is a new road near Elliot's alongside of the railroad. It is better than the old road, straighter. I have seen where they fixed the bridge on the new road but did not see who did it. I also saw a place on said road near the bridge where dirt was scraped or put on to the road to fill some ruts. I did not see anybody do it.

Cross-examined by Complainants.

Q. Was there not a period of time since the construction of the road up to last spring during which there was no planking across the railroad except at two narrow crossings?

Ans. I guess it was not planked all the way, if I recollect right. I can't say that I recollect more than two crossings. It seems to me that there was a place in the middle that was not planked. I know I used to go sometimes on one end and sometimes on the other.

Q. Do not difficulties frequently occur at this crossing in consequence of teams getting frightened?

Ans. I have heard of such things. I never saw any serious difficulty.

Q. Is not then the railroad and its use with cars and locomotives, some obstruction to the use of the the Buffalo road as a public highway?

Ans. It sometimes frightens horses.

Q. Do you decline answering whether it is some obstruction or not? if you do, please state your reasons for doing so.

Ans. I don't think it is any more obstruction than what I have stated. It sometimes frightens horses. I don't think the road itself is any obstruction except when the cars are upon it.

Q. How long have you resided in Harborcreek within a half a mile of the crossing?

Ans. I have not been where I am now (which may be a little over a half a mile) only since the latter part of April. I have lived for six years within three-quarters of a mile. I lived opposite Miller's tavern.

Q. Are you or have you been in the employ of the E. & N. E. R. R. Co.?

Ans. I worked, I believe, a couple of days hauling gravel, and last winter I hauled baggage a good many days. In no other way have I been employed by them that I recollect of now.

Q. How long since you were employed in hauling gravel?

Ans. It was when they tore up the track. I don't recollect now.

B. L. DOING.

Sworn and subscribed before us, June 28, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Charles Sheer, produced by respondents, was sworn, and testified as follows: I reside in Erie; am 31 years of age, and an engineer.

Q. State whether, as an engineer, you run a locomotive and trains over and across the point where the E. and N. E. R. R. crosses the Buffalo road in Harborcreek, at Mills'. If so, state whether there is anything, and if anything, what, to obstruct a full view of the Buffalo road at that crossing, east and west thereof, sufficient to prevent a collision between trains and teams at that crossing.

Ans. I have, and do run trains and locomotives over the point where the railroad crosses the Buffalo road at Mills'. There is some ways that there is nothing to prevent a full view, and there is some way that there is. A man on a locomotive going east can see teams west of the crossing as far as it is necessary to see them; I suppose both going east, or both going west, either way. But if the locomotive is going east, and the teams coming west and east of the crossing, the team will have to be within some 900 feet before it can be seen. There is a house that hides the view of them, until they get within 900 feet. That will vary when the engine comes up close to the crossing. You can see away up the road perhaps a half or three-quarters of a mile. When the team is within 900 feet of the railroad crossing, it can see west away up the railroad 5 miles. I know nothing in the crossing which would cause collision. The team would have 900 feet view, which would be sufficient distance to give signals to the team, but not time enough to stop the engine under ordinary circumstances, in case of heavy road or a bad rail. If under such circumstances the team *were* determined to go on, it would probably get run over. I mean by bad rail, wet or frosty.

CHARLES SHEER.

Sworn and subscribed before us, June 28th, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Dexter Rich, produced by respondents, was sworn, and testified as follows: I reside in Erie, am 32 years of age, and a carpenter by trade.

Q. State whether you are acquainted with the manner in which the E. and N. E. R. R. crosses Peach, Turnpike and Parade sts., in the City of Erie, and the Buffalo road near Mills', in Harborcreek, whether it crosses them at or near grade, and whether it obstructs their free use as public highways.

Ans. I am acquainted with those crossings. Peach and Turnpike Streets, in the City of Erie, are crossed at or near grade. It passes Parade a little above grade. It crosses the Buffalo road at Mills', in Harborcreek, at very near grade. I don't think the railroad obstructs their free use as public highways, except while the cars are passing.

Q. State the common height of large barn door.

Ans. They vary. From 10 1-2 to 12 feet is the general height. I have seen them 10 feet, and I have seen them 12 ft. high. They are seldom so low as 10 ft., or as high as 12 feet. They are the doors which I speak of, which are intended to drive loads of hay and grain into.

Q. State the height of an ordinary load of hay on its arrival in Erie from the country, and whether there is any other loading as bulky as that of hay brought to Erie market?

Ans. Ten feet is the height of a pretty good sized load of hay. I don't know of any other loading produced on a farm that is larger.

Cross-examined by Complainants.

Q. Have you not seen loads of empty casks or barrels higher than ten feet considerably?

Ans. I don't think I have. I never had any occasion to measure the height of them.

Q. Have you not seen loads of straw or corn fodder higher than ten feet, and is not a ton of straw more in bulk than a ton of hay?

Ans. I never saw any much higher. A ton of loose straw makes more bulk undoubtedly than a ton of hay; but if tied into bundles, I think the straw would not be more bulky than the hay.

Q. Have you not been for some time past, and at present, in the employment of the E. and N. E. R. R. Company, and have you not been called upon repeatedly to make voluntary affidavits in regard to their matters?

Ans. I have been more or less in their employ for the past year up to March last, and have not been in their employ since. I have been called upon to make affidavits, not repeatedly.

Q. Have you not taken an active and decided part for the Railroad Company against those who were alleged to be operating against their present location?

Ans. I have not. I have acted as their employee to do their work. When I have been called upon I have testified, to the best of my knowledge and ability, as to the matter in controversy.

Q. How many loads of hay have you measured the height of;

when did you measure them; whose loads were they that you so measured; and at whose request did you do it?

Ans. I have measured the height of 3 or 4. I measured them last summer some time—July or August, I guess. I don't know whose loads they were; I did not ask the men names. I was directed by Mr. Courtright, by John A. Tracy and John F. Tracy to go to work to improve the passage of French Street, and enlarge the passage, if that would satisfy the Councils. I measured these loads of hay not at anybody's request, but for my own information; I did it to make the passage sufficiently large. I also made a plan of a bridge to build a bridge over French Street. I presented my plan to the Councils for their acceptance. My orders was to build a new bridge if the Councils would accept of it when it was done and be satisfied.

Q. What time in the year was this done?

Ans. I think July or August last. I may be mistaken; it may have been in June.

Sworn and subscribed before us, June 28, 1854.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Joseph R. Ferguson, produced by respondents, was sworn and testified as follows: I reside in Erie, am 35 years of age, and am acting as deputy sheriff at the depot.

Q. State whether you are acquainted with the manner in which the E. & N. E. R. R. crosses Peach, Turnpike and Parade Streets in Erie City, and the Buffalo Road in Harborcreek, near Mills'; if so, state whether it crosses them at or near grade, and whether it impedes or obstructs their free use as public highways?

Ans. I am acquainted with the manner in which the E. & N. E. R. R. crosses at the points named. It crosses Peach and Turnpike Streets at grade; it crosses Parade above grade, and crosses the Buffalo Road at nearly grade. As far as the railroad track is concerned, I should think it did not obstruct their free use as public highways at those points.

Q. Are you acquainted with Penn Street; if so, state its length; whether you have counted the tracks of the railroad upon that st.; if so, how many there are at the intersection of Peach and Penn Streets; and what distance, or about what distance each track is upon or occupies the same?

Ans. I am acquainted with Penn St. It runs from Peach St. to Sassafras St. I have counted the tracks of the E. & N. E. R. R. upon Penn St. There are 3 tracks at the intersection of Peach and Penn Sts. The main track occupies Penn St. west 32 feet, 2 inches; it then runs on to the ground belonging to the company. The next track south occupies on Penn St. 86 feet and 5 inches. The next

track south runs nearly the length of Penn St. This third track, at the distance of 26 ft. 9 inches from Peach St., forks or branches. The two forks run nearly together for a number of rods until one diverges to the right, and the other keeps right on straight.

Q. State whether you have made a diagram or plan of Penn St., and the tracks of the railroad upon the same; whether it is not accurate, and, if so, please annex the same to your answer to this question.

Ans. I have made such diagram. It is accurate to the best of my abilities to measure it. It is a rough diagram. This paper, marked "Exhibit *F.*," and signed by the examiners and myself, is such plan and diagram.

Q. State when the platform, which your diagram represents as "new platform," was built, and whether it is not a temporary affair?

Ans. It was put up this last winter; I can't tell the day of the month. It is a temporary affair.

Cross-examined by Complainants.

Q. How far does the new platform, spoken of in your last answer, at its eastern end encroach upon Penn St.; and what length in front does it continue on said street?

Ans. It is 15 ft. on Penn St., at its eastern end being 3 ft., besides what would be the width of the sidewalk. I should think it was on the street 54 feet east and west.

Q. Does not the warehouse at that place also occupy a portion of Penn Street?

Ans. It does not.

Q. What is the width of Penn Street?

Ans. Sixty feet.

Q. Does each of these parallel lines marked on your diagram, filled up with cross lines betweeen them, represent tracks or lines of railroad on which cars may pass or stand.

Ans. They are tracks which except one are made and used for switching cars on to the main track.

Q. State, if you please, in whose handwriting the filling up of this diagram in red ink is.

Ans. It is William Brown's. He is clerk in the freight office of the E. & N. E. R. R.

Q. Are you not now and have you not been in the employ of the E. & N. E. R. R. Co., and in what capacity, and how long?

Ans. I am employed by the E. & N. E. R. R. Co., and by the Western Railroad Company, as deputy sheriff. I commenced a year ago last April.

Q. Who appointed you deputy sheriff at the depot, and who pays you for holding such an office there?

Ans. Thomas B. Vincent appointed me, and the railroad companies have paid me so far.

Q. State, if you please, whether your commission or appointment designates you as deputy sheriff at the depot.

Ans. It authorizes me to act as special deputy sheriff up there at the depot. I have such authority with his name to it, I don't know what to call it.

J. R. FERGUSON.

Clark M'Sparren, recalled by respondents, testified as follows:

Q. State whether you were a member of the Councils of the city of Erie on the 10th day of November, 1851. If so, state whether you were present when resolutions of that date, relative to Penn and Ritner Sts. were passed, and if so, state if you know the reason why the Select and Common Councils in said resolutions reserved the right to withdraw the privilege thereby granted, provided the use and occupancy of said streets should appear to them to be injurious to the interests and welfare of said city.

(Complainants object to that portion of the above question which asks for the reason of the action of the councils on the subject of reservation, the witness is incompetent to prove, or swear to, excepting so far as it relates to himself, and is not competent to prove the reason operating with his colleagues in the branch to which he belonged, and much more incompetent to prove the reasons operating on the minds of members in the branch of councils of which he was not a member, nor is it competent to prove by parol the reason for the legislative action of any body acting in that capacity. The only evidence on that subject is the action on record of the body themselves.)

Ans. I was a member of the Select Council in 1851, was present at the meeting the 10th of November of that year, when the application to lay down track on Ritner and Penn Streets was granted, as far as the Mayor, Select and Common Councils had legal power and authority. I would state that Ritner Street was opened upon private property, being run through the centre of the third block of outlots from 12th Street, Penn Street was laid out from 2 blocks of outlots, the 4th and 5th from 12th St., by the owners of property. As to Penn Street, there was no objections, no remonstrance to the track being laid down. As to Ritner Street there was, I might say.

As to Penn and Ritner Streets, my own opinion was, that they were to be viewed differently from those laid out in the original plan of the town, being considered as private streets. The councils so viewed it, consequently they made the reservations they did.

Cross-examined by Complainants.

Q. When was Penn Street laid out, and when laid out was it not dedicated to public use by deed?

Ans. Penn Street, from Peach to Sassafras Streets, it is my impression, was laid out in 1835 or 1836, and was a recorded street

from that time. Penn Street, from Peach to French, was laid out in 1841, by Mr. Brewster, Mr. Cadwell, and myself. We being the owners of that property. That street, from Peach to French, has never been recorded, only as we have sold property we have deeded by it.

Q. Was it not surveyed and located on the ground, and agreed upon as a public street?

Ans. It was laid out for the benefit of the property.

Q. Was it not so constituted a street for public travel, and not restricted to the mere use of property holders?

Ans. There was no restrictions, it was laid out for the benefit of the property.

Q. Are you a stockholder in the E. & N. E. R. R. Company, if not now, have you not been, and if so, to whom, and when did you transfer your stock?

Ans. I am not now a stockholder. At the time the road was located, I agreed to release or rather to take pay in stock for lands in the outlots through which the road passed; for which the jury awarded me a hundred and eighty dollars, which stock I long since disposed of. That is all the stock I ever owned.

Q. Are not the select and common councils of the city of Erie required by law to exercise legislative functions in distinct and separate bodies; and did they not so legislate and in separate rooms at the time of the enactment of the resolutions you have testified to?

Ans. They are required by law and do act separately and require the common consent of both to the enactment of a law. They did so legislate and in separate rooms at the time I have testified to.

C. McSPARREN.

Subscribed to this 28th day of June, 1854. He having been sworn on first examination.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

John F. Tracy re-called by respondents testified as follows:

Q. State when, if you know (within the city of Erie) the E. & N. E. R. R. Co. commenced the construction of their road.

Ans. They commenced the construction some time in August or September, 1849.

Q. When was it built into the city of Erie, when completed and commenced running?

Ans. I believe the track was laid in the fall of 1851, finally completed in the fall or winter of 1851 and '52. The first train came through January 8th, 1852. It was graded ready for the superstructure, in the city of Erie in August or September, 1851.

JOHN F. TRACY.

Sworn on first examination, and subscribed June 28th, 1854, before us,

GEO. H. CUTLER,
JAMES SILL,
Examiners.

Wednesday, June 28th at 7 P. M. the examiners adjourned. The examination of witnesses on the part of respondents being closed.

GEO. H. CUTLER,
JAMES SILL,
Examiners.

And afterwards, to wit, on the 7th day of September, in the year last aforesaid, the opinion of the court was delivered by Judge Black, Chief Justice.

This case requires us to give a construction to the charter of a private corporation. The frequency of such cases excites some surprise, when we reflect that an act of incorporation is and always must be interpretated by a rule so simple that no man, whether lawyer or layman, can misunderstand or misapply it. That which a company is authorized to do by its act of incorporation it may do, beyond that all its acts are illegal. And the power must be given in *plain* words, or by *necessary* implication.

All powers not given in this direct and unmistakable manner are withheld. It is strange that the Attorney General, or anybody else, should complain against a company that keeps itself within bounds, which are always thus clearly marked, and equally strange that a company which has happened to transgress them, should come before us with the faintest hope of being sustained. In such cases ingenuity has nothing to work with, since nothing can be either proved or disproved by logic or inferential reasoning. If you assert that a corporation had certain privileges, show us the words of the Legislature conferring them. Failing in this, you must give up your claim, for nothing else can possibly avail you.

A doubtful charter does not exist; because whatever is doubtful, is decisively certain against the corporation.

If loss or injury comes to anybody in consequence of an ignorant disregard of this principle, it is not our fault. We have done all that in us lay to impress it on the public mind, and to warn corporations of the danger they might incur by disobedience. We enforced it to the utmost in The Bank of Pennsylvania *v.* The Commonwealth, the Susquehanna Railroad Company *v.* Sunbury and Erie Railroad Company, The Pennsylvania Railroad Company *v.* Canal Commissioners, The Commonwealth *v.* The Franklin Canal Company, and in several other cases. All of our predecessors on this bench occupied the same ground. The doctrine is maintained by the Supreme Court of the United States, and in many States of the Union. Even in England the justice and necessity of it are univer-

sally acknowledged and acted upon. But we do not mean to discuss the subject over again. The lawyer who is not already familiar with the numerous authorities upon it, to be found in every book of reports, will probably never become so; and the citizen who does not believe it to be a most salutary feature in our jurisprudence, would hardly be convinced though one rose from the dead.

Our duty in this case is, therefore, not a difficult one. If the words of the defendant's charter understood in their ordinary sense, cover the acts complained of; or if there be a necessary implication of the power to do these acts, and nothing to forbid them, then this bill must be dismissed. But the defendants can take nothing at our hands by construction. We cannot widen the limits set to our privileges, because they have found them inconveniently narrow. We have no right or authority to stretch an old act of incorporation than we have to make a new one. In either case, we would be usurping legislative power, and granting away from the State privileges which she has seen proper to withhold.

The bill complains: 1st. That the western terminus of the defendants' railroad is not where the act of incorporation requires it to be. 2d. That it is so constructed as to impede and obstruct the free use of certain streets in the city of Erie. 3d. That it also obstructs and impedes the free use of a public road laid out from Erie in the direction of Buffalo; and 4th. That the defendants have made a contract by which they have surrendered the control of their road to a foreign corporation.

I. The act of incorporation authorizes the defendants to build a railroad "*from the borough of Erie*, to some point on the east boundary of the township of Northeast." The defendants' counsel insist that the word *from* should be taken inclusively, and that a road from any part of the borough to the proposed *terminus adquem* is a compliance with the law. On the other hand, the counsel for the plaintiff insists that it must begin at the borough line, and not elsewhere. Our opinion is with the defendants on this point; but we think the argument on it was rather beside the purpose. Since the terminus of the railroad is neither at the line of the borough, nor inside of it. Coming from the east, it passes the east boundary of the borough at a distance of sixty rods south, and runs on about rods further, in a direction precisely parallel with the south line of the borough, and there stops, or connects with the road built by the Franklin Canal Company to the Ohio line.

Certainly this is not a literal compliance with the act of incorporation. Making a road from a point selected by the defendants themselves sixty rods south of the borough, not coming within that distance of the borough at any place, is not making a road *from* the borough eastward. Is there anything in the peculiar circumstances of the case which will justify us in treating this infraction of the law otherwise than as we treat similar violations of duty when committed by companies? We shall see.

What I have said concerning the borough of Erie, refers to what it was when the act of incorporation was passed. In 1848, and before the defendants' work was made, its limits were extended so as to include the place where the terminus of the railroad has been fixed. At a still later period, the borough was incorporated as a city. But we are very clear that this alteration of the borough lines did not in the least change the rights or obligations of the railroad company. All laws must be executed according to the sense and meaning which they imported at the time of their passage.

A line which did not exist until 1848, could not have been in the minds of the legislature in 1842.

The modifications made in the charter of the borough left the defendants' charter just where it was before.

The amendments of the one is not to be taken as a supplement to the other. If "the east boundary line of Northeast township" had been shortened or obliterated, or differently named by an act of assembly, passed in 1848, the defendants would have understood very well that their right to locate the eastern terminus on any point of the township line as it existed in 1842, was not thereby altered or taken away. The law commanded the defendants to begin their railroad at the borough of Erie, as it then was, and that command is in full force notwithstanding the change which has been made in other matters.

Is this violation of the charter so trifling that we can overlook it on the principle of *deminimus?*

The counsel of the company have not argued that it is, and certainly it is not. The place at which the terminus should be established being precisely and particularly designated by the act of incorporation, in words which render mistake impossible, all other places, whether near or far, are as surely excluded as if they had been expressly forbidden. If we cannot hold companies to a strict compliance with their charters, we cannot hold them at all. In some situations (and for aught we see this may be one of them), the purpose and the object of allowing the road to be built can be as completely defeated by a deviation of sixty rods as sixty miles. The Directors must have thought that they could gain a point of great value to them by changing the terminus, or else they certainly would not have ventured upon it in the teeth of the law. And they must have been conscious, too, that the legislature had some important reason for confining them to the borough, or else they would have sought and got an amendment to their charter. This railroad was probably intended as an outlet to New York for the lake trade of Erie. It could not have been meant as a link in the connection between Buffalo and Cleveland, for there was not then any authority given to this company, or any other, to build a road westward from Erie to or towards the Ohio line. Its actual location puts it beyond the reach of the lake trade, being one hundred and ten feet above, and three-quarters of a mile distant from the harbor. It connects

itself there with a road to Ohio, built in violation of law, and by a fraud which has already received its condemnation. By this means it has become a part of a continuous from New York to the west, carrying goods and passengers, not to the borough of Erie, but quite around and past it. I mention this merely as showing that the general scope of the law, as well as its literal words, has been disregarded. It is suggested, however, as a mere probability. We do not know nor care what the purpose of the State may have been. But one thing we do know, and that is enough, that the Board of Directors had no right to substitute their will for the plain requirements of the law. If the fair interests of the stockholders; if the accommodation of the neighboring people; if a due regard for the commerce of the whole country; if a magnanimous liberality to the citizens of adjoining States; if these considerations, or any one of them, required an amendment to the charter, the managers should have asked the proper authority of the government to make it. Assuredly there is no legislative body on the face of the earth to whom such an appeal, if well grounded, could be made with more certainty of success than to the General Assembly of this State.

II. The right of the supreme power to authorize the building of a railroad on a street, or other public highway, is not now to be doubted. It has been settled, not only in England (1 Barn. and Ad., 30), but in Massachusetts (23 Pick., 328), New York (7 Barb., 509), and in Pennsylvania (6 Whart., 43). If such conversion of a public street to purposes for which it was not originally designed does operate severely upon a portion of the people, the injury must be borne for the sake of the far greater good which result to the public from the cheap, easy, and rapid conveyance of persons and property by railroad. The commerce of a nation must not be stopped or impeded for the convenience of a neighborhood. But we can say this only in cases where the authority has been given by the sovereign power of the State. That any private individual, or incorporated company, not empowered to do so by an act of the legislature, can take possession of a street, and make a railroad upon it, without being guilty of a criminal offence, is a proposition which I am sure no lawyer would dream of making. The right of a company, therefore, to build a railroad on the street of a city, depends, like the lawfulness of all its other acts, upon the terms of its charter. Of course, when the power is given in express words, there can be no dispute about it. It may also be given by implication; for instance, if a company be authorized to make a railroad by a straight line between two designated points, this implies the right to run upon, along, or across all the streets or roads which lie in the course of such line. So also, when an act of incorporation directs a road to be made between certain termini, by such route as the grantees of the privilege shall think best, it may be located on an intervening street or other common highway, if in the judgment of the directors it be necessary or expedient to do so. But when an act of incorporation authorizes

the making of a railroad which it is not possible to make without using the streets of a town for a part of it, still such street cannot be so used if the same act of incorporation forbids it. If the powers given to the corporators cannot be executed without disregarding the restrictions with which they are coupled, they cannot be executed at all. In a private deed, an exception as large as the grant is void, because private deeds are construed most strongly against the grantor. But a grant of privileges by the State to a body of adventurers must be construed precisely the other way: in favor of the public and against the grantees. A prohibition, exception, or reservation in a charter, must, therefore, stand in full force, though it destroy or make nugatory all the powers given to the company.

The act of incorporation now before us contains the following very emphatic clause: "The said railroad shall be so constructed *as not to obstruct or impede the free use* of any public *road, street, lane or bridge*, now laid out, opened or built, or to interfere with any burial ground, dwelling-house, or building, without the consent of the owner." It would certainly strike most men, upon the first look, that a railroad company with such a provision in its charter is on dangerous ground when it takes possession of a street. It is not at all easy to understand how the people of a city can have the use of a street, free from obstructions and impediments, when the street is of ordinary width and has two railroad tracks upon it, along which locomotive engines, with trains of cars, are running every five minutes of the day. Nor is it by any means impossible that in this case the legislature intended to exclude the company altogether from the streets, even at the risk of having no railroad made, for the desire to preserve to the people of Erie and its neighborhood the free use of their streets and roads, may have been stronger than the wish to establish a railway communication for them with New York.

An obstruction is anything *set in the way*, whether it totally closes the passage or only hinders and retards progress. A road may be obstructed more or less.

The word impediment is almost synonymous with obstruction, except that it is seldom, if ever, used to signify an entire blocking up of the way.

It is an obstacle—not an impassable barrier. To understand these words in their ordinary import, and then say that a railroad is not *per se* an obstruction or impediment to the free use of a street by the public, is rather more than I can do.

But, perhaps, it is not quite safe to interpret them according to their popular sense. Certain it is that they have sometimes been otherwise used in Acts of Assembly. A law of Massachusetts provides that, "if any railroad shall be so laid out as to cross any turnpike or other way, it shall be so made as not to *obstruct* such turnpike or way." It was decided (23 Pick. 226) that this did not prevent all interference with the road, but required only that it should cause the least possible inconvenience or impediment.

By a statute of this State, enacted in 1803, the owners of lands adjoining navigable streams were permitted to build dams, provided that such dams should "not *obstruct* or *impede* the navigation of such streams, or prevent the fish from passing up the same."

This Court (4 Watts, 440) declared, that if these words were taken literally, the owners could not avail themselves of the privilege at all; but as the construction would have been contrary to the grant itself, a more liberal one was adopted, and a dam which did not *materially* hinder the navigation was held not to be within the prohibition.

Although the reasoning of these cases does not altogether fit the one before us, they are entitled to much weight. They are decisive, indeed, of one thing which is important, namely: that the words in question may sometimes have a legal signification different from that which we would otherwise have been disposed to assign them. For the sake of consistency we must follow the steps of those who went before us, though it be true that the track is not very clearly marked. Let it then be conceded as a possible thing, that a railroad can be so constructed on a public street that it will not be an obstruction to its free use; that such railroad is not in any sense a nuisance *per se;* that a street may be occupied in common with a railroad and the public without any such inconvenience to the latter as will amount to an impediment, or abridge the freedom of its use for ordinary purposes. Still it is not true (as the converse of the argument would make it) that the street is unobstructed as long as travel upon it is not entirely prevented. If it be proved that a man may squeeze himself along beside the track, or dodge across at the peril of his life, it does not follow that the use of the street is free, unobstructed and unimpeded.

We hold, therefore, that under a charter like this, a railroad cannot be built on a street in such a manner as to cause any material obstruction.

If we assume, as we do, that the clause under consideration does not entirely forbid the company from going on any street, we must also allow them to create such impediments as cannot be avoided.

But those which are not absolutely *necessary* to the making and using of the railroad, are unlawful; for managers are bound to leave the street as nearly free from obstructions as they can, and for that purpose to spare no reasonable expenditure of money or labor. If, for instance, the railroad be made above the level of the street, they must grade the rest of the street also, if that will make it better for the public accommodation.

They cannot say to the city authorities: We have destroyed your street, and rendered it impassable; but we have not impeded its free use, because you can restore it again to a tolerable condition at your own expense. Neither does it make any difference whether it be a main thoroughfare or an unimportant by-street, for this act of incorporation protects all alike.

We have attentively considered the bill, answer, and evidence, in the cause, and they satisfy us of the following facts:—

1. A considerable portion of one street, within the present limits of Erie City, is occupied almost entirely by the railroad in a manner which makes any considerable use of it for other purposes almost impossible; and this is true, although the defendants themselves say that the street might be safely and conveniently used if it were properly graded—a duty which they left unperformed.

2. Two streets are crossed by the railroad on bridges, which are too low and too narrow for large wagons passing one another, or for a single wagon with a bulky load.

3. Two other streets are crossed on an embankment, considerably above grade, with a ditch on each side, and thus all passage along those streets by any kind of vehicle, is as completely stopped as it could be by a stone wall twenty feet high. All these things are illegal, for the reasons given. That some of these streets are on low, wet ground, and little used, might be a sort of apology for the defendants, if we were sitting here to take excuses for the violation of the law. But that is no part of our duty.

A large part of the evidence refers to the danger encountered by persons obliged to cross the railroad when trains were approaching, and the delay and inconvenience caused by cars which totally blocked up the crossing places. If the defendants have a right to use it when made, they may carry all the freight and passengers they can get. If the number of cars and locomotives necessary to do their business be so great as sometimes to choke the thoroughfares over which they pass, it must be remembered that the same thing would happen in a much greater degree if the twentieth part of the business were done in carriages, coaches, and common road wagons. If the cars are suffered to stand for an unnecessary length of time, at places inconvenient to the public, the act is indictable as a nuisance, and for any want of proper care, the defendants are liable in damages to the persons injured by it. But it cannot be said that they have violated their charter in causing obstructions of this kind, unless such obstructions could have been prevented or diminished by a different construction of the road.

Under other circumstances, the voluminous body of evidence laid before us might require a much more extended discussion. But we are content with the compendious reference we have made to it, because every inch of this railroad which lies upon any street of the city is unlawful, at all events.

If the defendants had begun their railroad at the place designated in their act of incorporation, they would not have interfered with any of the streets mentioned in the bill, except Ash Lane, and that would have been crossed at a different place. When a railroad authorized to be made at one place is made at another, it is a mere nuisance on every highway it touches in its illegal course. The streets in question not being on any route which the defendants were

authorized to take, they are on them in disobedience of their charter, and all they have done there is without the shadow of authority. It is useless, therefore, to inquire how much of the inconvenience complained of might have been avoided by better construction. It is enough to say that the railroad has no business at all to be where it is.

It appears that the city authorities gave their consent to the use of the streets, and to the location of the railroad on the ground which it now occupies. This privilege was given "so far as the Mayor and Councils have legal power in the premises," upon condition that the railroad should cause the least possible obstruction to the ordinary travel and business of the streets, and with a reservation of the right to withdraw the privilege whenever it should appear to the Councils to be injurious to the interest and welfare of the city. The condition was broken and the privilege was revoked. But if the resolution of the Councils had remained in full force up to this time, it would have been of no avail here. They had no "legal power in the premises." An act of the legislature cannot be repealed or modified by the ordinance of a city corporation. What the defendants did in disregard of the law was no less an offence against the rights of the public, because the city was in some sort *particeps criminis*. If both had persisted in it, the Commonwealth's duty would have required her to see that the rights of her citizens were vindicated against both.

III. It is alleged and proved, and not denied, that the railroad has been laid down on and along a public road, called the Buffalo road, in such a way, that for some distance it cannot be, and is not, used by the public at all, but on the contrary, that portion of the people who would otherwise travel thereon are obliged to take another way, which the railroad company has opened for them. Of course, this is within the prohibition against obstructions and impediments to the free use of public highways. The answer to this charge is not based on any interpretation which the charter is thought to be capable of. Other grounds are taken. One defence is, that the railroad could not be made in a straight line without taking a part of the Buffalo Road. We can only say that if a railroad cannot be made straight without violating the law, it must be crooked, or not made at all. Equally baseless (even if true) is the other argument, that the public has suffered no injury by this act. Those public interests which lie outside of the defendants' charter are not committed to their keeping.

The legislature has thought proper to guard the right of the people to the free use of their roads by enjoining the defendants not to impede or obstruct them. This injunction it was wrong to disregard, even for the sake of a supposed public benefit. The people have rejected the boon which the Company tendered them, and the State *parens patriæ* now demands for them the rights which are secured and reserved by her own laws.

IV. The charge that the defendants have, by contract, surren-

dered the control of their road to a foreign corporation, was but faintly pressed in the argument. We do not consider the contract illegal, and if our opinion were different, we would withhold it until all the parties could be brought before us.

This disposes of the principal allegations in the bill. But aside from these there are one or two matters suggested by the defendants' counsel, which ought not to be passed without remark.

They have argued that no decree could be based on obstructions created by the use of the railroad, because the act of incorporation provides only against the road being so constructed as not to impede, &c., and the bill charges nothing else. Whatever impediments are caused by the ordinary and proper use of a railroad we attribute to its construction, if such impediments could have been avoided by a different construction.

The legislature said to the corporators, you may make a railroad between certain given points, and use it when made by running cars and steam engines on it; but you must so make it that its existence and use in this way will not impede the travelling on any highway now laid out. The railroad is so made that locomotives cannot be used on it without impeding the travel on a certain highway, previously laid out. Such a railroad is not constructed according to the law. If it were the use would be proper enough.

The defendants' counsel have made another point which it is right to notice. It is said that though this proceeding is conducted in the name of the State, its real object is to redress a supposed injury, which is private, or at most merely local, in its character. We are urged to look not at the flag, but the parties who fight under it. These parties—the public authorities of Erie, and the people of the neighborhood—encouraged the defendants to expend large sums of money in building the railroad, and the attempt which they are now making to break it up, is denounced in the argument as an act of wanton injustice. The only party before us is the Commonwealth. We do not even know the names of the other persons alluded to. The Commonwealth complains in due form by her accredited legal representative, the Attorney General, that one of her corporations has violated its charter. We have investigated the case and found the complaint to be true. The delinquent corporation cannot justify itself by showing that in the commission of the wrong it received aid and comfort from other persons. If the Mayor and Councils of Erie, or their constituents, connived at a breach of law, they were guilty of a sin, for which their best excuse is that they seemed to have repented of it, and are now disposed to assist the State in bringing the other offenders to the same wholesome state of mind. It cannot be that the defendants were *misled* by the people or their officers, for they must have known that a city ordinance could not authorize what an act of the legislature forbade. No LACHES can legally be imputed to the Commonwealth, and in point of fact, she has been guilty of no unfairness. She spoke her will plainly in the act of

incorporation, and gave it to the defendants to be a guide to their feet and a lamp to their path. They disregarded it. The Attorney General proves the fact and stands up for judgment. We cannot refuse what law and equity demand.

Decree.

This cause came on to be heard before the Supreme Court, on the bill of complaint, on the answer of the defendants, and on the proofs and evidence taken by both parties, and was argued by counsel; and thereupon it appears to this Court that the defendants have built, and do now use and maintain, a certain railroad known as the Erie and Northeast Railroad, of which said railroad a part is within the present limits of the City of Erie, and upon certain streets thereof, and another part is upon the bed of a certain public road, known as the Buffalo road, in Harborcreek township in Erie County, and that the said railroad in those parts thereof is a public and common nuisance. It is, therefore,

Ordered, adjudged, and decreed, that the defendants shall, on or before the expiration of four months from this date, break up so much of their said road as lies upon the said streets, and upon the Buffalo road, and remove the materials thereof, so as to leave the said streets and road in as good condition as they were in before the construction of said railroad.

And it is further declared and adjudged, that the said defendants are bound to make the borough of Erie, with such limits as it had in 1842, the western terminus of their railroad. It is therefore decreed and ordered, that the said defendants shall, within four months from this date, change the route and construction of their railroad accordingly, and make their western terminus at what was the eastern line of the said borough in 1842, or within the same borough. And the said defendants shall reconstruct their railroad to supply the parts hereby ordered to be broken up, according to plans and specifications to be by them made, and to be submitted to and approved by this Court, on full notice to the counsel of the commonwealth, and not otherwise. And the defendants shall pay all lawful costs, to be taxed by the prothonotary.

Lowrie, J. I concur in nearly every part of the opinion read by my brother, the Chief Justice, and in the decree that is about to be pronounced, and it would have afforded me great pleasure to have the concurrence of my brethren in pronouncing one more stringent in its requisitions.

The defendants were incorporated in 1842 to make a railroad from Erie to the State line on the east, and it is very plain that the sole thought that was in the mind of the Legislature, in incorporating it, was to provide a means of commercial connection between the harbor of Erie and the State of New York. It is very plain, also, that this company has turned almost entirely aside from this

purpose to one that was not at all intended, and with the aid of that fraudulent concern, the Franklin Canal Company's road, they have carried out their own main purpose of forming a connection between Ohio and New York, and have converted the intended and proper terminus of their road into little better than a water station.

And in the course of their proceedings they have shown very little regard to the public authorities of the State. Contrary to law, and in violation of the express orders of the road commissioners, they took possession of a part of the Buffalo or Ridge Road, and used it according to their own will. And much of the same disregard of the public authorities has been exhibited in their relations with the public officers of the City of Erie. Though a mere private corporation, and operating for the purpose of gain, they seem to have assumed that the regular local authorities must stand aside for them, as if in the presence of their official superiors. I discover very palliation for their errors, and should have been willing to allow them much less indulgence in the mode of retracing their steps.

I am sorry that my brethren think that when an incorporated town or city is made the terminus of a railroad to any point within the town or city, and along any of its streets that they may choose, and this without being at all subject to the direction or restraint of the local authorities. I should have been pleased to have the concurrence of my brethren in a contrary doctrine. It seems to me that this is giving to mere private corporations or associations a superiority thus far over those public functionaries to whom the interests of the public are intrusted, and this, too, by no necessary implication. It seems hard enough to have to make such an implication in relation to a town or city that lies between the termini.

Let it be called illiberal to break the connection between this road and the western one. This is a matter not for us, but for the Legislature to consider, and perhaps they have done so. It is not impossible that we may allow the cry of illiberality to drive us into a Quixotic and impracticable cosmopolitism. State pride, State enterprise, patriotism, is selfishness; but it is the very form of selfishness that is at the bottom of all national glory. I trust that it is not to be frittered away by the mere American feeling, which is always tending to obliterate the local and more effective feelings out of which our present liberties grow, and upon which they depend.

Knox, J., concurred.

Lewis and Woodward, Js., dissenting.

At the sitting of the Supreme Court in Erie, in September, subsequent to the making of the foregoing decree, plans and specifications for the change of their road in Erie and Harbor Creek, in pursuance of said decree, were presented by defendants to the Court, and their approval moved.

The counsel for the Commonwealth filed the following exceptions:—

1. That the plan proposed for the change of route in Harbor Creek only proposes a partial removal of the railroad from the Buffalo road, leaving one portion of the last named road occupied by the railroad, as it was prior to the decree.

2. That a location of the railroad should be north of the Buffalo road, and not south of it, as proposed.

3. That the proposed location at and with the city, will obstruct the streets of the city, and will entirely occupy Twelfth Street to Mill-creek with turnouts, switches, &c., and as the population increases, will greatly and injuriously interfere with the trade, commerce, and business of the city.

4. The proposed terminus will be on Twelfth Street, within the old borough limits, at which point defendants' water stations, &c., must be erected, which will *necessarily* obstruct and almost exclusively occupy the same, contrary to the decision of the Court and the prohibition contained in the charter of said company.

5. The said railroad should be located and constructed to the harbor, whence it could be taken without obstruction to the streets of the city, and when an authorized connection with the western road can be made as soon as the same may be constructed to said point, by the Erie and Northeast Railroad.

6. The harbor of Erie is the legal point to which the railroad should be carried.

And the case was afterwards argued at Pittsburgh; and the Court thereupon rendered the following opinion and decree:—

Black, C. J.:

The bill in this case complained that the Erie and Northeast Railroad Company had violated its charter. We heard the case fully, and I may add, ably argued by counsel on both sides, at Philadelphia, in July. We held it under advisement until our meeting here in September, and then gave, as the result of our deliberations, an opinion that the charter had been violated by the company. It seemed to us too clear to admit of doubt, that the allegations of the bill were sustained in these particulars, namely: 1. The defendants were bound by the act of incorporation to make the western terminus at or within the borough of Erie, as it was in 1842; whereas it was fixed sixty perches southward of the south line. 2. Even if its location southward of the old borough had been in itself lawful, it would have been rendered unlawful by the manner in which the streets of the city were impeded and obstructed. 3. The railroad occupied the Buffalo road in such manner as to make it useless and impassable, in direct contradiction of the charter. The decree which followed this opinion could do nothing less than require the road to be taken up at those places where it was adjudged to be illegal, and reconstruct it in such manner as to conform to the requirements of the charter. We made such a decree, and there we might have stop-

ped. In strictness, our duty would have been done by simply commanding the defendants to relocate their road so as not to violate the act of incorporation again, and leave them to disobey it, if they dared to encounter the peril of so doing.

We were not bound to tell them beforehand what new location would be lawful and what unlawful. But it was plain that a dispute like this could not be so settled. The company might commit another error, and if they did not, the Attorney General might suppose they did. In either event the contest would be resumed, and misconstruction of the charter would be made worse by misapprehension of the decree. For these reasons it was thought best that we should order the plan of reconstruction to be submitted to us before it was executed, giving to the counsel of the State the right to be heard in opposition; so that when it was approved the company might proceed in security, and the objection of all other parties be silenced, so far as the authority of this Court could silence them.

In pursuance of the decree, a plan has been submitted by the company which the counsel for the Commonwealth object to in strong terms, and insist that the company should be compelled to make the road according to another and widely different plan, prepared under their direction. The principles by which we are to settle this question is very plain.

We sit here as a judicial tribunal to administer justice according to the law of the land. The charter of this railroad company is a part of this law, made on purpose to define the rights and obligations of all parties in this business. Because the defendants got outside of their charter, we command them to repair their error, cost what it might. We listen to no remonstrance grounded on the loss and trouble which it would occasion them. Their plea of policy and public benefit, in opposition to law, was summarily set aside.

All their excuses based on considerations outside of the legislative act which gave them a corporate being were utterly disregarded. We would hear of nothing but the charter then, and we can hear nothing else now. We must give the defendants the same measure of justice that has been meted out against them. The representatives of the Commonwealth "stood up for justice and her bond;" and we award her all that we found nominated there, when we adjudged the defendants to have transcended their charter, and decreed that they must bring themselves within it. We will not go behind nor beyond that decree, but standing directly upon it, we declare again, that if the defendants comply with their charter, we think it strange that the Attorney-General or anybody else should complain of them.

The act of incorporation requires this road to be made "from the borough of Erie." This is obeyed when the road is made from any part of the borough. If the Legislature had designated a particular spot as the *terminus a quo*, we would have ordered it to be made there. But the decree is what it ought to be. Exactly as broad as

the charter, and not broader or narrower. They must start at or within the borough. By the plan before us, they propose to do so, and this brings us to the point where our control of them ceases. If they had done so at first, we could not have disturbed their location, and it will hardly be denied that what would have been lawful then is equally lawful now. That a Company which is authorized to make a road from *any* part of a borough may make it from one part as well as *another*, is so mere a truism that one hesitates to utter it. The discretionary right of fixing the terminus at a definite point within the limits assigned is vested by the organism of this Company in the Directors. We have it not. We cannot resolve ourselves into a board of directors, nor can we delegate the authority of such a board to the Attorney-General and his assistant counsellors. We approve the plan laid before us by the defendants, so far as concerns the location of the terminus, because it does not appear to conflict with any law; and whatever may be our private preference for the other plans, we cannot force them on the Company, simply because neither we nor the persons who made them have the legal power to do so. To all the arguments derived from the commercial interests of Erie and of the State, we give a full answer when we say that we are here to pronounce the law, and not to settle questions of policy or trade. If we had any ambiguous charter before us, equally capable of two different constructions, one beneficial and the other injurious to the public trade, we would prefer the former as being most probably the true intent of the Legislature. But that is not this case; for here the charter is not in the least doubtful.

Another objection to this location is more grave, because it bases itself on a provision in the act of incorporation. It is said that the streets would be less obstructed by taking the road down to the harbor than by locating it where the defendants propose. The Company is forbidden to make the road so as to obstruct or impede the free use of any street. These words, taken literally and in their strongest sense, would prevent the railroad from being made on the streets at all. But we follow authority in saying they were not to be so interpreted. The defendants have the right to use a street if they take care to obstruct it as little as the nature and character of their improvements will permit, if they create no material or unnecessary impediment—no obstruction which could be avoided by any reasonable expenditure of money or labor. They cannot occupy the whole of a street and drive the public away from it altogether. But any street which is wide enough for a railroad and the public both, may be used on the terms mentioned. This applies to all the streets—to those on the south as well as those on the north side of the borough—the streets already built up, and to such as are laid out with reference to the future growth of the town.

The defendants in their answer attempt to justify their occupancy of some of the streets by showing that they were wet, low, and little used. But we allow this to have no legal weight whatever, and add

that it made no difference whether it was a main thoroughfare or an unimportant by-street, for this act of incorporation protected all alike. Having administered this rule against the defendants, it cannot be that we are seriously expected to deny them its benefits now when it works in their favor. Their duties and the rights of the public being the same in all the streets, we cannot force them out of one and into another. Nor can we compel them to take their road where no streets are; for the privilege of locating it on streets, if certain conditions be observed, is granted to them by the charter.

A part of the railroad is laid upon and occupies the very bed of the Buffalo Road in Harborcreek township. The defendants propose to take up a part of it, and to leave another part, about 800 feet in length (which equally interferes with the Buffalo Road), where it is. We cannot see how any distinction is to be made between those two portions of the railroad. There is, in fact, no material difference. At both places the public travel is so obstructed that it is turned away all together. At one the company has made a new road, and at the other the people have found a way for themselves alongside of the road they used to travel upon. But in both cases the public is equally deprived of the use of the road. It is idle to talk of laying down a railway on the middle of a common country road, and running locomotives and cars over it constantly without impeding or obstructing the free use of it by the public. The commonest kind of common sense forbids us to believe that such a thing is at all possible.

On the broad streets of Erie—Twelfth Street is one hundred feet wide—it may be done. The clearest evidence of this being an obstruction is found in the fact that no man does use the road as formerly at the place in question. It is true that the travelled way is not far distant, and, for aught we know, it may be just as good and commodious; but it runs for the most part over private property, which may be fenced up any day in the year. We say again that the defendants must govern themselves by the law, and not by their notions of public interest.

The decree commanded them to take up and remove all that part of their railroad which lies on the bed of the Buffalo Road, and they must obey it.

Decree.

And now, to wit, Novem. 2, 1854, at the present term, come the defendants by their counsel, and, after due notice, present to the Court plans and specifications for a proposed alteration of the route and location of their road, so as to enter the borough of Erie as the same was in 1842, at Twelfth Street, along the course designated in said plan, which is placed on file. And the said defendants also present a plan for a proposed change in the route and location of their road where it interferes with the free use of the Buffalo Road at Harborcreek, as designated in a plan on file, which said plans were ac-

cepted to on the part of the Commonwealth and argued by counsel, and the exceptions and arguments of counsel being heard, and the Court being fully advised in the premises, the Court do find the plans and specifications first mentioned, the change in the route and location of said road at the borough of Erie to be in conformity with the charter of defendants, and the decree of this Court heretofore made, and do approve the same.

And the Court find the plan of the proposed change at Harborcreek, where it occupies 800 feet of the Buffalo Road, not to be in conformity with the charter of defendants and the decree of this Court, and do disapprove the same, approving it in other respects. By the Court.

LEWIS, J.—In order that I may not be misunderstood, I proceed to state the reasons which induce me to concur in the final decree about to be entered in this case.

When a municipal corporation is made the terminus of a railroad, it is not like a tree, a rock, or any other object not liable to any material change, either under the laws of nature or the laws of man. It is more like a river, whose boundaries are changed by accretion and detrition. The rapid increase of population so frequently demands an extension of the boundaries of cities and towns, that such alterations are deemed to lie in the contemplation of the legislature when making enactments, and of individuals when transacting business in relation to them.

This is the rule in England, and it is one which applies, with peculiar propriety, to a new country like our own.

A contract with a city or borough may be enforced against it, notwithstanding a subsequent change of its boundaries: 3 S. & R. 127. Where new territory is added, the old and new portions are liable, under the corporate name, for all obligations which existed before; and having discharged them, the respective portions are left to settle the equities of the case afterwards, between themselves. The ordinances of a borough or city are always made with reference to the boundaries which may exist at the time any act may be done which is supposed to come under their operation. Who can doubt that an ordinance, passed before the boundaries of Erie were extended, prohibiting nuisances in the highways, would, by the mere act of extension of the borough limits, be fully operative over every highway within the enlarged boundary of the corporation? When a corporation accepts a new charter it retains its possessions, recovers its debts, and is bound by its liabilities, as existing before the change: 1 Saund. 344, note 1. The London and Southampton Railway act directs that where a bridge shall be erected for the purpose of carrying any turnpike road over or across the railway, the ascent to such bridge shall not be more than one foot in 30 feet, except where the "*present inclination*" of such turnpike shall be steeper. In the construction of this statute, it was held, that the expression "present inclination," is to be referred to the inclination of a road *at the time*

when taken by the company, and *not at the time when the act of Parliament was passed.* See Attorney General *vs.* The London and Southampton Railway Company, 1 Railway Cases, 283. When an act of Parliament, which was passed in 1840, prohibited the erection of any turnpike gate in the town of Taunton, it was decided by the Queen's Bench, that the word "town" referred to the boundaries existing *at the time the gate was erected*, or *continued*, and *not to the boundaries existing at the time the act was passed.* It was declared that "if a new gate is to be erected in 1870, the trustees were bound to consider whether the road is then within the limits of the town of Taunton, not whether it was so thirty years before." Reginæ *vs.* Cottle, 16 Adol. and Ellis, N. S.; 71 Eng. Com. Law R., 412. It is conceded, and has been decided by the Court, in the interlocutory decree already made in this cause, that there were a city or borough is made the terminus of a railroad, the whole territory within the municipal limits must be regarded as a single point, and that the terminus may, therefore, be established at any spot within the limits thus prescribed, according to discretion of the company. An extension of the boundaries of the municipality is, therefore, nothing more than an enlargement of the discretionary powers of the railroad company, and cannot possibly be a violation of its chartered rights. Even if it were so, it is clear that none but the railroad company itself could complain of it. But in this case the company made no complaint. It took the commonwealth at her word, and established the terminus within the new boundaries. This, in my opinion, was in exact accordance with the true construction of the statute, as settled by repeated adjudications. But were it otherwise, the State has acquiesced in the location, until the company has fully completed its work, and has expended large sums of money in the construction of the railroad, and in the erection of the necessary buildings for the depot. The road was in full operation, in connection with another road running west, establishing an extensive line of railway communication from the east to the west, long before any objection was made by the commonwealth. In addition to this, it should be remembered that the railroad company was bound, under pain of forfeiting its charter, to complete its road within a specified time. That time had expired before this bill was filed. It is now too late to re-locate the road, and re-construct it, so as to save the forfeiture; and the counsel for the commonwealth plainly intimates a determination to take advantage of the forfeiture, unless the new location shall be satisfactory as to induce her to waive it. The long acquiescence of the State, with full knowledge of her rights, in this large expenditure of money, made in good faith, precludes her from making objections to the location. This principle applies with irresistible force, wherever it is necessary, in order to save a forfeiture.

Forfeitures are in general so odious, that courts of justice seize upon slight circumstances of acquiescence for the purpose of relieving against them.

But there are positive acts of the State, in addition to her mere acquiescence, which preclude her from making objections to the location of the road at Erie. The Franklin Canal Railroad was connected with the Erie and Northeast Railroad at the very point now objected to, at the time the State seized and took into possession the former road. Instead of repudiating that connection as illegal, the legislature expressly directed the Governor to "keep it in repair and good running order, for the accommodation of the public travel and business." This was done and the State herself made use of the Western Railroad, and derived revenues from its connection with the other road, at the very point now complained of.

This is not all. By an act of last session the Franklin Canal Railroad has been sold for a large price, by the State herself, to the Cleveland, Painsville and Astabula Railroad Company. It was the very connection now complained of that gave the Franklin Canal Railroad its chief and almost only value. Without that connection no such price could have been obtained for it. The sale was made without the slightest intimation in the Act authorizing it, that any change was to be made in the Eastern Railroad at the point of connection. On the contrary, there was much in the Act to encourage the belief that this connection, as existing and in use at the time of the sale, was not to be disturbed. Upon the plain principles of common honesty, the Commonwealth ought not now to destroy the value of her own grant, and to deprive her own grantee of the consideration for which a large sum of money has been paid. But apart from the mere justice of the case, the act of the State in making this sale, has a *legal* effect which should certainly bind her. The connection between two railroads is an act which requires the concurrence of both. When a statute authorizes one company to connect with another, the authority, although in different degrees, is necessarily conferred upon both. One is to do—the other is suffer; one is active—the other passive. The sovereign, having authority over both, by ratifying the connection as to the first, necessarily confirms it as to the last. There is no escape from this view of the case.

The legislation of last session, in relation to the Western road, and the Acts of the State under it, have ratified and confirmed the location of the Erie and Northeast Railroad, at the point of connection. For these reasons I was opposed to the decree which directed that part of the railroad to be broken up and reconstructed, so as to terminate within the limits of the borough of Erie, as they existed in 1842. The question now is not whether the proposed location is the most advantageous one for the interests of the City of Erie, the Company, or the public, but whether it is within the powers of the Company, as expounded by a majority of the court. There is no room for doubt on this subject. It is in accordance with the decree, and we have no right to exact more. A railway company has no right to act capriciously to the injury of others; but where

this is not the case, its charter constitutes it the judge of the most convenient mode of conducting the works. The London and Birmingham Railway Co. *v.* The Grand Junction Canal Co., 1 Railway Cases, 224.

I come to the alteration proposed to be made at Harborcreek. The power to construct a railroad involves every power necessary to accomplish the object. In a country were public highways abound, it might be impossible to avoid crossing them. It necessarily follows that the company has the right to cross them, where they lie in the route of the railroad, doing as little injury as possible, consistent with the legitimate use of the latter. When the superior advantages of railroads are considered, and their capacity to promote "the greatest good of the greatest number" is taken into view, it is plain that the limited travel on the ordinary roads ought to make some sacrifices for the advancement of an object of such extensive and paramount benefit of the community. It has been repeatedly decided that a railroad on a public street is not a nuisance *per se*. The inconveniences which it occasions are but the natural results of increased commerce and travel. The more a thoroughfare is used for its legitimate purposes, the greater may be the *in*conveniences to those who have occasion to use it. But while each in so using his privilege as not unnecessarily to annoy others, there is no legal injury to any one, and therefore no legal grounds of complaint. The right to cross a public road in the construction of a railroad, is as clear as the right to construct the road itself.

The angle at which it crosses must necessarily depend upon circumstances. It is certainly not restricted to a right angle where this would require dangerous curves. Short curves in a railroad interfere with that velocity which is the main object of this description of improvement. They also endanger the lives of passengers on the ordinary roads, as well as those in the railroad cars. It is therefore of primary importance that the line of railroad be straight. This paramount object to be secured, if possible, although in doing it the common roads may be crossed repeatedly, and at various angles, or even approached so near as to alarm horses and cattle in sections of country unused to the noise of the locomotive, or to the grand and imposing spectacle of a long train of cars filled with thousands of human beings, or freighted with many hundred tons of merchandise, whizzing past them with almost lightning speed. The idea that a railroad must be made crooked in order to avoid proximity to, or crossing an ordinary road, is one which would embarrass and impair the usefulness of this, the greatest improvement in commercial intercourse which the world ever saw. It places an object of minor importance above that which, in its tendency to promote the general benefit, is so far superior as to be altogether inestimable. It places ignorance above science, indolence above enterprise, and the minority above the majority. It is of close kindred with the doctrine that the owners of the adjacent lands have a right to

pasture their cattle on the railroad track, and to compel the engineers and conductors to stop a long train of cars while they endeavor, by means of sticks, clods, and stones, to drive off, and keep off the cattle long enough for the train to pass in safety.

I have already said that the power granted to the railroad company to construct its road between the points designated in its charter, gives it the right to cross every other road that lies in its route. It has therefore a right to cross the Buffalo road, or to run in proximity to it. In doing so, it is bound to so use its privilege as not *unnecessarily* to interfere with the public highway. It has a right to a straight line, free from unnecessary curves, elevations, and depressions.

If these must exist in one or the other of the two lines of communication, common sense, and the general interest of the community require that they should exist in the ordinary highway rather than in the railroad. The duty to do as little damage to the common highway as possible, consistent with their fair uses of the railroad, carries with it the *power to do such acts as are absolutely necessary to avoid such damage.* If the common road can be crossed *at grade*, the body of it must be so altered and constructed as to make the crossing as convenient as possible for wagons and carriages, &c. If the railroad crosses at an elevation too great for this, the common road *may be raised to a reasonable degree by embankment, and a bridge substituted for the road;* or it may be depressed so as to admit of a passage under the railroad. In both of these cases the site of the road is necessarily changed, and the power to make the change has never been denied. It results from the duty imposed. It is true that these alterations in the *site* of the highway are vertical ones. But there is no difference in principle between a vertical and a lateral alteration. A change in a *horizontal direction* is as fully authorized as one in *a direction perpendicular to the horizon.* They both stand precisely upon the same principle. It follows, therefore, that where the necessities of the case require it, the highway may be removed in a horizontal direction to avoid the obstruction otherwise necessarily created by the railroad. Where the highway is so crooked as to require the repeated crossings at inconvenient angles, as appears to be the case with the Buffalo road at Harborcreek, the right to change its location in a horizontal direction flows from the obligations imposed. In performing their duty, the railroad company is bound to purchase the necessary ground, to pay all expenses of construction, and all damages which may be done to the private right.

No evil can arise from the exercise of this power, which might not be produced by intrusting it to the Quarter Sessions; or, as in the case of some counties, the road commissioners under special acts. All inferior tribunals are subject to the review and control of the Supreme Court, and the railroad corporations of the commonwealth are expressly made subject to the "supervision and control" of the same

tribunal. So that if they abuse their power by improperly or unnecessarily changing the location of a public highway, or by the defective reconstruction of it when changed, an ample remedy has been provided by law. The final confirmation of the road, as changed, is decided by the same power that finally establishes the location of all other public highways by whomsoever laid out.

In England, the railway companies under the Consolidation Act of 1845, and under various other statutes, constantly exercise this power. No evil has been found to flow from it. The science, experience, and force at command of these companies point them out as peculiarly well qualified for the trust; and the official supervision existing there, as well as here, sufficiently secures the public against any abuse in exercising the authority.

But in this case, even if any doubts existed in regard to the original right of the company to make the change at Harbor Creek, considerations have supervened which ought to weigh strongly with the Court in deciding upon that part of the case.

The company appears to have acted in good faith under the belief that its acts were authorized by law. It has, so far as I am able to judge, substituted a more convenient road for the one which has been interfered with by the railroad. A large expenditure of money has been made in the construction of one of the best and most extensively useful railroads in the Union. During the time that the company was expending its money in the reconstruction of the Buffalo road, and in the construction of the railroad, the commonwealth interposed no objection, and the public have adopted and are travelling over the new highway. There has been a long acquiescence in the action of the railroad company. The unauthorized and irregular proceedings of the excited population in destroying the railroad structures, cannot be regarded as protests by the commonwealth, which take away the effect of their silence and acquiescence. It has been properly said that, in deciding this case, we are not to look at the action of the local population or of their authorities, but at the *flag under which they are now making battle.* They are in the field under the banner of the commonwealth, and the rights of the State are the only rights which she can enforce in the present proceeding. The assent of individuals, or even local authorities, cannot legalize, nor their dissent invalidate, the location of the railroad. If the railroad has not been constructed with as little injury to the highway as possible, this is a substantial ground of complaint which the Court should stand ready to redress with promptness and energy. But if the commonwealth merely complains of a defect of authority in a company to change the site of the highway, and desires upon that ground to break up the railroad, although the change has made the public road better than it was before, she is too late. Such an application, on mere technical grounds, could not be granted after such a long acquiescence and so much money expended, without objection, and in good faith: 1

Railway cases, 436; 18 Ves. 515; 2 Dowl. P. C. 519; Shelford on Railways, 441. But a majority of the judges of this Court have taken a different view of this question, and it has been decreed that the railroad must be broken up and reconstructed, so as not to interfere with the Buffalo road at Harbor Creek. The question now is, does the alteration proposed avoid the interference in accordance with the decree? I think it does. The railroad company has been driven by judicial interpretation upon the breakers, and I am unwilling to force it further out of its course than the necessity of the case requires in order to avoid them. The terminus of the railroad, as well as its location generally, must depend upon the condition of the ground, the demands of trade, and a variety of other considerations which are not subjects of judicial cognizance.

I regret most sincerely that a majority of my brethren have thought that the proper construction of the charter requires these inconvenient and dangerous deviations from a straight line in one of the most extensively travelled railroads on the continent. But it is clear that we have no authority to control the company further than to confine it within the limits of its charter. We have therefore no right to deprive its directors of the discretion reposed in them by the law; and we cannot compel them to adopt the locations recommended by the authorities of Erie. On this part of the case I fully concur with the Chief Justice in the opinion just delivered. The result is that the railroad has been seriously injured, and the company put to great expense, while the citizens of Erie have entirely failed to secure the object of their exertions. The change of location thus forced upon the company will produce no advantage whatever to any one, and least of all to the people of Erie. If this doctrine should be forgotten, like a judgment in an ordinary personal action, I should feel less mortification at the result. But in impairing the usefulness of this great thoroughfare of the western world we have erected a lasting monument. Its voice, like the herdsman's call, will reverberate along the hills and valleys after the original sound shall have died away; and the light which it sheds upon railroad science, like that reflected in the evening sky, will remain after the body from which it emanates shall have departed.

Another plan for the location of the road at Harborcreek was then presented, and an extension of time asked by respondents.

The counsel of the Commonwealth objected, whereupon the Court made the following order, 19 December, 1854:—

The defendants in this case having submitted to the Court another plan for the change of the railroad, at the place where it interferes with the Buffalo road, it is ordered that the said plan be filed, and seeing no reason to believe that, by this plan, the Buffalo road will be legally interfered with, or its free use obstructed or impeded, within the meaning of those words as used in the defendants' charter,

we approve it. The said defendants have also, by their counsel, moved for an extension of the term within which the decree required them to complete the change in their work, and we think it reasonable that the time should be extended. It is, therefore, ordered that sixty days further time after the 7th of January next be allowed the defendants to do the acts and things which the said decree required them to perform.

This approval of the plan and extension of the time for executing it does not and cannot, in any manner or degree, affect the question whether the right to make the railroad has been forfeited by the fact that it was not properly made within the time mentioned in the charter. If anything in this whole proceeding can have any influence on that question, it was the original decree, and not the orders made at different times concerning the mode of its execution.

Knox and Lowrie, J's, dissenting.

Several intermediate orders were made at the instance of defendants' counsel, for writs of assistance and suspending of the decree for the removal of the railroad in the city of Erie. The following was then moved by defendants' counsel:—

And now, to wit, May 17th, 1855, it is moved that the time for executing so much of the decrees of this Court in reference to that portion of respondent's railroad, that lies west of Ash Lane, in the City of Erie, be extended until one month after the argument and discussion in this Court upon the Bill No. 7, of December term, 1854. The Cleveland, Painesville and Ashtabula Railroad *vs.* The City of Erie, *et als.*

21st May, 1855. Motion allowed. Knox, J., and Lowry, J., dissenting.

The following opinion was afterwards filed, delivered by

BLACK, J.—It was thought at first that the decision of the majority on this motion was so simply just and necessary that it might well be left to vindicate itself. But the want of unanimity in the Court has convinced some of us that our reasons ought to go on record.

By the decree of November last, the defendants were commanded to change the terminus of their road so as to bring it within the limits of the old borough of Erie, as their charter required.

To prevent the new location from creating a new dispute, we ordered that it should be made on plans to be previously approved by the Court. When these plans were submitted, the counsel who argued the cause for the Commonwealth appeared before us with plans made out under the direction of the City of Erie, and asked to approve none else. We could not do this without taking from the defendants the privilege plainly given in the charter of selecting their own location within the prescribed limits. We could not, and of course we did not, appoint the City Councils to act as directors of the railroad company, instead of the directors chosen by the stockholders.

Nor did we assume the authority to act as directors ourselves. The Attorney-General had asked us to enforce the laws of the Commonwealth, and had no show of right to ask for anything more. The law was obeyed by going within the borough. If that was not sufficient to satisfy the people of Erie, it was the fault of those who passed the act of incorporation, and not ours.

A time was fixed for the decree within which the change was to be made. We were afterwards satisfied by the fullest proof that the time first allowed was not long enough, under the circumstances, to finish a work of that magnitude, and we extended it. The further extensions since that time being allowed in the face of a very earnest opposition, and on grounds not at all foreseen at the date of the decree, require a somewhat minute explanation.

The Erie and Northeast Railroad, running westward from the New York line, connects at Erie with the railroad built by the Franklin Canal Company, which was forfeited to the Commonwealth, and sold to the Cleveland, Painesville and Ashtabula Company. Without this connection neither of the roads would, for the present, be able to do the business it was intended for. Certainly a break would cause an immense loss and very great inconvenience to the proprietors and to the public. When, therefore, the lower company was about to finish its new track and take up the old one, it became absolutely necessary for both that the upper company should meet the lower at the new terminus. The Cleveland, Painesville and Ashtabula Company claimed the right to form this connection under the contract by which it purchased the work from the State. But the City Councils denied that any such right existed. Here was a most important dispute, involving on the one hand the probable ruin of two railroad companies, and on the other a very great amount of local glory to the town councils.

The companies professed to be confident in the legal foundation of their claim. The very learned and highly respectable counsel for the city candidly admitted before us that the question was doubtful.

And how did the councils propose to settle this doubtful right? By main force; by the unerring law of the strongest; by the convincing argument of blows and knocks; by the profound logic of pulling down bridges and tearing up rails. Do they expect us to approve of this? Not they. It would surprise them as much as others to find us sanctioning anything of the sort. They know perfectly well that courts of justice were instituted to prevent the necessity of such irregular appeals to brute strength. The time has gone by when doubtful rights were tried by the ordeal of *battle;* the experience of mankind has demonstrated that the righteous cause and the strong arm are not always on the same side.

We are not denying that a public nuisance may be abated without waiting for its condemnation by a legal tribunal, provided it can be done without endangering the public peace; and provided also that it be a clear case, and free from all complication with other interests.

But where a body of men take it upon themselves to be their own judges and their own executioners in a matter like this, affecting in some degree the trade of the whole country, and where it may turn out after all that the claim of the right they are opposing is legal, they ought to know that they are resuming perilous responsibility. Even in a clear case, if the wrong be persisted in under an erroneous belief on the part of the wrong doer that he has the law with him, an appeal to the judicial authority is the preferable mode of redress, and should be encouraged.

The use of physical force as a means of reaching the justice which the law would administer without it, is to be discountenanced in every plausible way, for reasons perfectly obvious to all who love order or have any regard for the safety of human rights.

The directors of the Western Company have the right to connect with the other, or else they have not. If they have such right, the violent and forcible interference of the city with its exercise is illegal, mischievous, and dangerous to all concerned, in ways which I will not stop here to describe. If the company was wrong, the Councils could have demanded justice in the regular way, and waited hopefully for the decision. It might have postponed their triumph a little while, but their superior wisdom would have been indicated all in good time, and with rather more effect than it can be by any number of bludgeons in the hands of their constabulary force.

It is contended that this violence is justified because it puts the city in a better position and the Company in a worse one before the Court; that if the connection were once formed, the Company might plead its expenditure against a bill to change it. No doubt this argument was made in the purest good faith. But a little reflection will satisfy every one that it is not sound. When did a majority of this Court—when did any Court in the State—ever refuse to bring a corporation within its charter? When did we fail to give the benefit of every doubtful word to the public? When did we hold that a wrong was sanctified by the money expended in its perpetration? I think that we may safely assure the City Councils that the mode of conducting hostilities has neither diminished the ultimate chances of their adversaries nor increased their own claim to peculiar favor.

But it was our duty to deal with the matter as we found it; and so we did. When the Western Company filed their bill in this Court, and moved for a preliminary injunction to restrain the city authorities and their adherents from the violence used and threatened, we could not grant nor consider the merits of the question between them, for reasons which were then fully stated and need not now be repeated. We were obliged to leave the parties in their original attitude, the plaintiffs claiming what they asserted to be a clear right under a contract with the State, and the defendants asserting that it was doubtful, and avowing their determination to prevent its exercise by force. Meanwhile, the time allowed for the execution of the decree against the Eastern Company was running

rapidly out. When that Company should be compelled to take up its old track and run exclusively to its new terminus within the borough, the break so disastrous to both would necessarily take place. It was thus that mere physical strength was about to defeat what might be a legal right for aught we could then know. In the best aspect, it was anticipating the decision of the proper judical authorities. Considerations which we could not disregard without setting a precedent which we deemed dangerous in another way, made us powerless to restrain the Councils and their adherents by any direct interference between them and the Western Company. Then it was that the simple plan was suggested from the Bench of extending the time allowed the Eastern Company to change its track. This at least was within our power. If the new connection must be prevented by force, the old one might be preserved by law until the rights of the parties could be ascertained and determined.

A motion to that effect was made by the counsel of the Companies. It was opposed not only with ability but with some ardor. The city of Erie and its representatives were not content that there should be any connection at all. It seemed a part of their specific object to do the Companies as much mischief as possible, while the questions between them were still *sub judice* and the right unsettled. Perhaps this was natural in men whose passions had been heated by a long and fierce contest, in which they had suffered some wrongs. But it was not for us to gratify them.

When a bill in Equity is filed, it becomes the unquestioned right and plain duty of the Court to keep the subject matter of the dispute as nearly as possible in *statu quo*. Here the important matter was the connection of the roads. We found the two Companies in the possession of a continuous railroad. The object of one party was to break it up—that of the other was to preserve it. Which had the right it was impossible for us to say before a final hearing. Until then we simply let it stand as it is. In due time it will be broken, if an Act of Assembly cannot be produced giving the right in plain terms. Otherwise, the Company will be protected, as it ought to be.

Against this course two points were pressed in the argument:—1. That we had no authority to relieve the Cleveland, Painesville and Ashtabula Railroad Company, by making an order in another case against the Erie and Northeast Railroad Company. 2. A part of the latter Company's railroad being pronounced illegal and a nuisance, to give time at all for its removal is wrong, improper, and without the sanction of the law.

The first of these propositions is not supported by an authority or precedent. It is not embodied as a rule of practice in any case of procedure that we know of. Nor is there any principle of justice, convenience, or policy, which requires us to adopt it. Two railroads are threatened with ruin—it may be undeserved ruin—which ought to be averted at least until their doom is legally pronounced. They

are before the Court in separate proceedings. Our hands are tied in one case, but in the other we have full power.

We are asked to make an order in the latter case, and it is objected to, because it will effectuate the whole purpose too well. The argument in substance is, that we must wrong both for fear that both may be righted. It would be very unfortunate if our consciences could be touched in that way. The more ground the order may cover, the more it commends itself to our best judgment: *Boni judicis est ampliare justitiam.*

It is the duty of every judge to make a just decree reach as far as possible, and to give the suitors before him the fullest protection he can in the shortest way that the law has left open. The soundest decisions have done more good incidentally than they have ever done directly.

But it is said that we have no power to give any time whatever for the removal of an illegal railroad.

In the opinion of the objecting counsel, we are interfering with the sacred rights of the people if we forbid them to abate a public nuisance whenever they please. If this be true, our whole duty was done in the present case when we ascertained the character of the defendants' railroad.

A decree for its removal was not necessary at all. We should have simply fixed the *caput lupinum* on the offending corporation, declare it an outlaw, and left it not to the forbearance of the State, but to the mercy of its private enemies. If we had adopted this view in September last, we would have stopped every car with all the passengers and freight on the road, as soon as our opinion could reach Erie by telegraph. Incalculable loss and injury would have been inflicted on thousands of persons guilty of no offence against the State except that of confiding in her justice and honor. But we are not asked to commit any such wanton and unnecessary outrage on innocent parties. It was conceded all round that we should mould our decree in the manner best calculated to enforce the law at the smallest expense of inconvenience and hardship. We allowed what time we thought reasonable under the circumstances then existing, without hearing of this objection.

Afterwards when other facts were brought to our notice, we gave more, and still the idea that we were exceeding our power had not arisen to the dignity of a doubt. Now, however, it takes upon itself all the state of an argument. We have the power. Those who deny it forget that the commonwealth, by the act of filing the bill, placed the railroad under our immediate protection, to guard the rights of all parties in interest, as well as to enforce their obligations. When a public nuisance has become the subject of judicial investigation, the power of a private citizen to remove it is gone. After that no man may touch it with the hand of violence, except in the way and at the time directed by the Court having cognizance of the subject.

This principle is constantly acted upon by every Court of Equity in the world. Two years ago it was announced by ourselves with entire unanimity; and obedience to it was enforced against the same parties who now again claim the privilege of disregarding it.

When it was regularly made to appear that the corporators of the Erie and Northeast Railroad Company had violated their charter, we spoke of their acts in the strong terms of reprobation which we thought they deserved. But that decision is not authority for refusing justice to them, or to another railroad company, when they happened to be right.

Having once judged them according to the law, it does not follow that we must now command them to be smitten against the law. But the Councils of Erie appear to be possessed of the notion that we are ready for anything they may demand. They call upon us to locate the terminus at the harbor, when the opinion was scarcely dry in which we had decided it to be legal anywhere within the borough, was bold enough. Yet it surprises us still more to be told that we have lost by our decree the power to say when or how it shall be executed; that we must disgrace the equity jurisprudence of the State by admitting that it cannot or will not provide for the safety of innocent persons, when it strikes at the wrongs of the guilty; and that its justice consists in bringing indiscriminate ruin on all alike.

We order that the execution of the decree against the defendants in this case be suspended until the existence or non-existence of the right to perform the *the* connection be ascertained on the hearing of the bill already filed for that purpose by the other company. Of course, this order will be revoked if the bill be not prosecuted with all due diligence. But we make it with the utmost confidence that it is necessary and proper. It will prevent mischief which, if once committed, could never be repaired; it will leave all parties at the final hearing in the same position they were at the beginning of the dispute; it will enable us then to do, without difficulty, the justice which might otherwise be impossible; and it will save the councils of Erie, themselves, from the dangerous consequences of their own rash and unadvised behavior.

COMMONWEALTH OF PENNSYLVANIA,
Eastern District, ss.

I, Robert Tyler, Prothonotary of the Supreme Court of Pennsylvania, within and for the Eastern District of said State, do hereby certify that the foregoing is a full and correct transcript of the proceedings had in the above named case, wherein the Commonwealth of Pennsylvania *ex relatione*, Francis W. Hughes, is Complainant, and the Erie and North-east Railroad Company are Respondents, as the same is of record in my office; and the foregoing bill of complaint, answer and demurrer, replication, exhibits and testimony, decrees and

orders, are truly taken and correctly copied, from the originals on file in the said case, and as fully as the same appear of record in my office.

Witness my signature and the seal of said Court at the city of Philadelphia this 3d day of December, A. D., 1857.

[SEAL.] RO. TYLER,
Prothonotary.

THE UNITED STATES OF AMERICA, ss.

The President of the United States of America: To the Honorable the Judges of the Supreme Court of the State of Pennsylvania, greeting :—

Whereas, in a certain suit in said Supreme Court, between the Erie and Northeast Railroad Company, and Joseph Casey, which suit was removed to the Supreme Court of the United States by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit :—

" That a perfect record has not been certified to this Court."

You, therefore, are hereby commanded, that searching the records and proceedings in said cause, you certify what omissions you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court, forthwith.

Witness the Honorable Roger B. Taney, Chief Justice of said Supreme Court of the United States, the first Monday of December, A. D., 1856.

[SEAL.] WM. THOS. CARROLL,
Clerk Sup. Court U. S.

COMMONWEALTH OF PENNSYLVÁNIA, ss.

In obedience to the command of the within writ, I, Ellis Lewis, Chief Justice of the Supreme Court of the State of Pennsylvania, do certify that the foregoing is a full, correct and perfect transcript of the proceedings had in the said Court, in the case wherein the Erie and Northeast Railroad Company were complainants, and Joseph Casey, defendant, as the same is of record in said Court, in the Eastern District of Pennsylvania.

In testimony whereof, I have hereunto set my hand, at Philadelphia, this third day of December, Anno Domini 1857.

ELLIS LEWIS,
Chief Justice.

COMMONWEALTH OF PENNSYLVANIA,
Eastern District, ss.

I, Robert Tyler, Prothonotary of the Supreme Court of Penn-

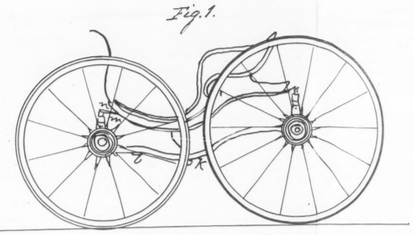
sylvania, within and for the Eastern District, do hereby certify that the foregoing is a full, correct and perfect transcript of the proceedings had in the Supreme Court of Pennsylvania, in the case wherein the Erie and Northeast Railroad Company were complainants, and Joseph Casey, defendant, as the same is of record in said Court, in the Eastern District of Pennsylvania.

Witness my signature and the seal of said Court, at the City of Philadelphia, this 3d day of December, A. D. 1857.

[SEAL.] RO. TYLER,
Prothonotary.

No. 161. Fig. 1.

Fig. 1.



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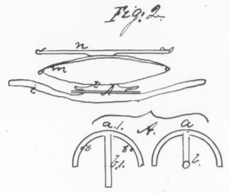

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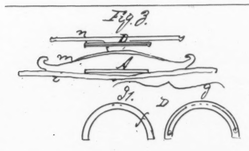

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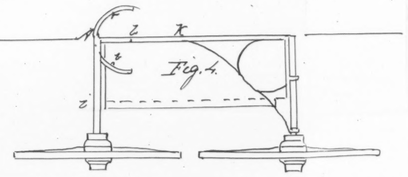

Gustavus Hasselknecht

Improvement in Running gear of Carriages

Patented Jan. 13. 1852

Fig. 5.

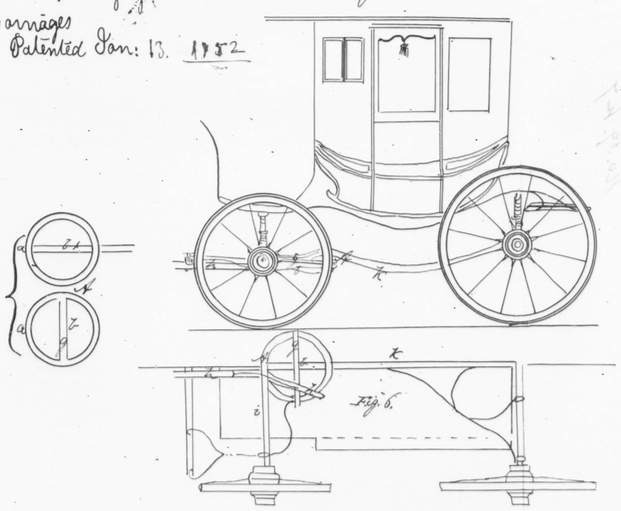

Fig. 6.

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No. 161. page. 12.

Fig. 7

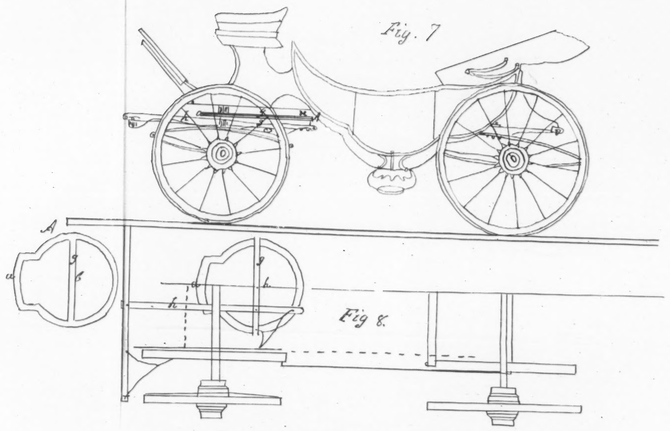

Fig 8.

Fig 9.

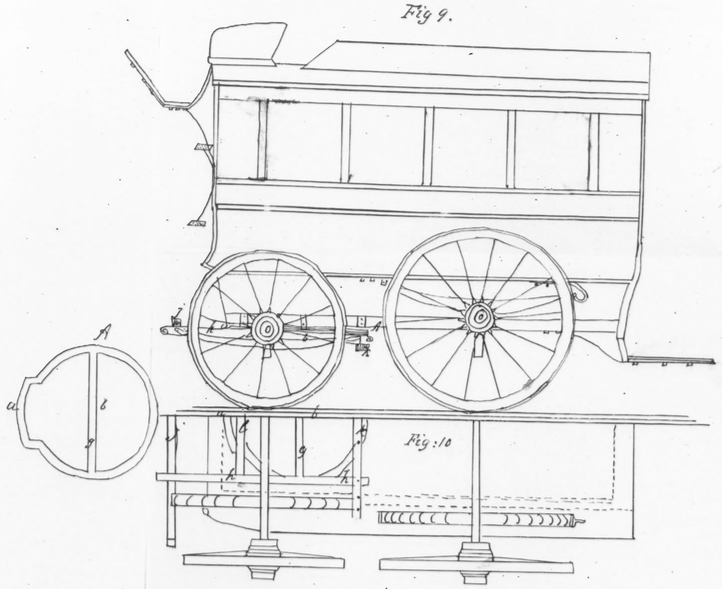

Fig: 10

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GALENA

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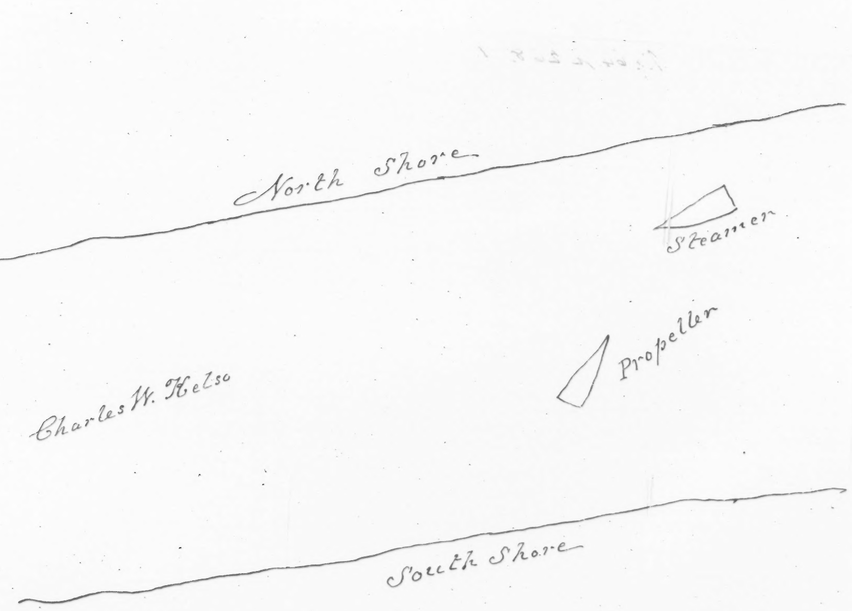

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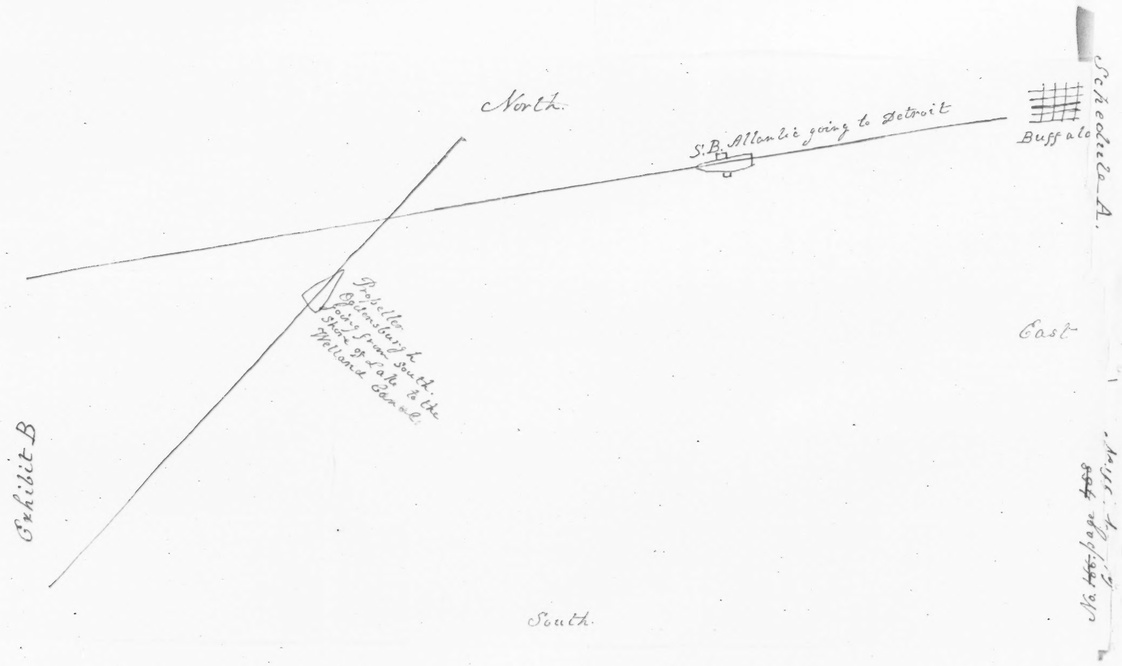

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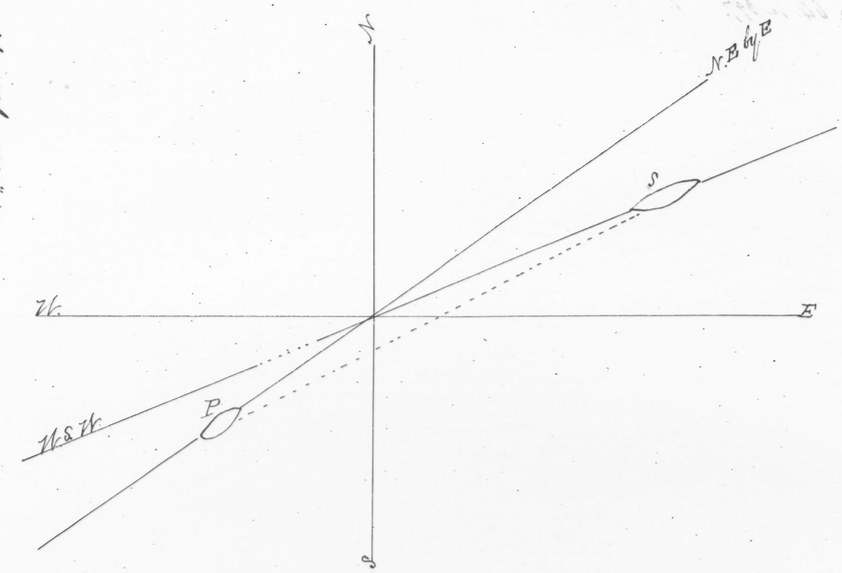

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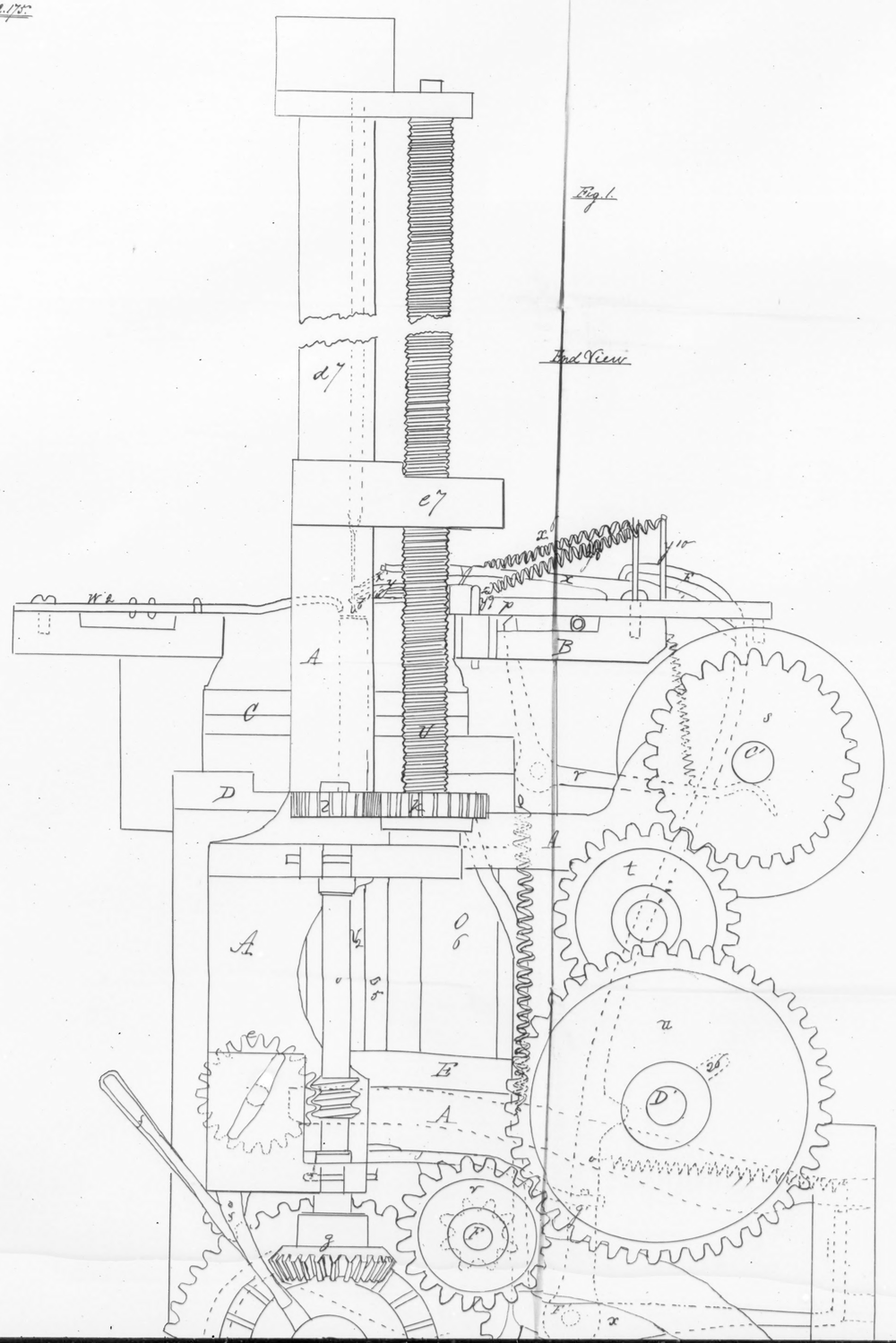
No. 169 — pa. 42 —

Sheet 1.

Jos. S. Winsor's Weaver's Harness. Patented January 2nd 1855

No. 12.175



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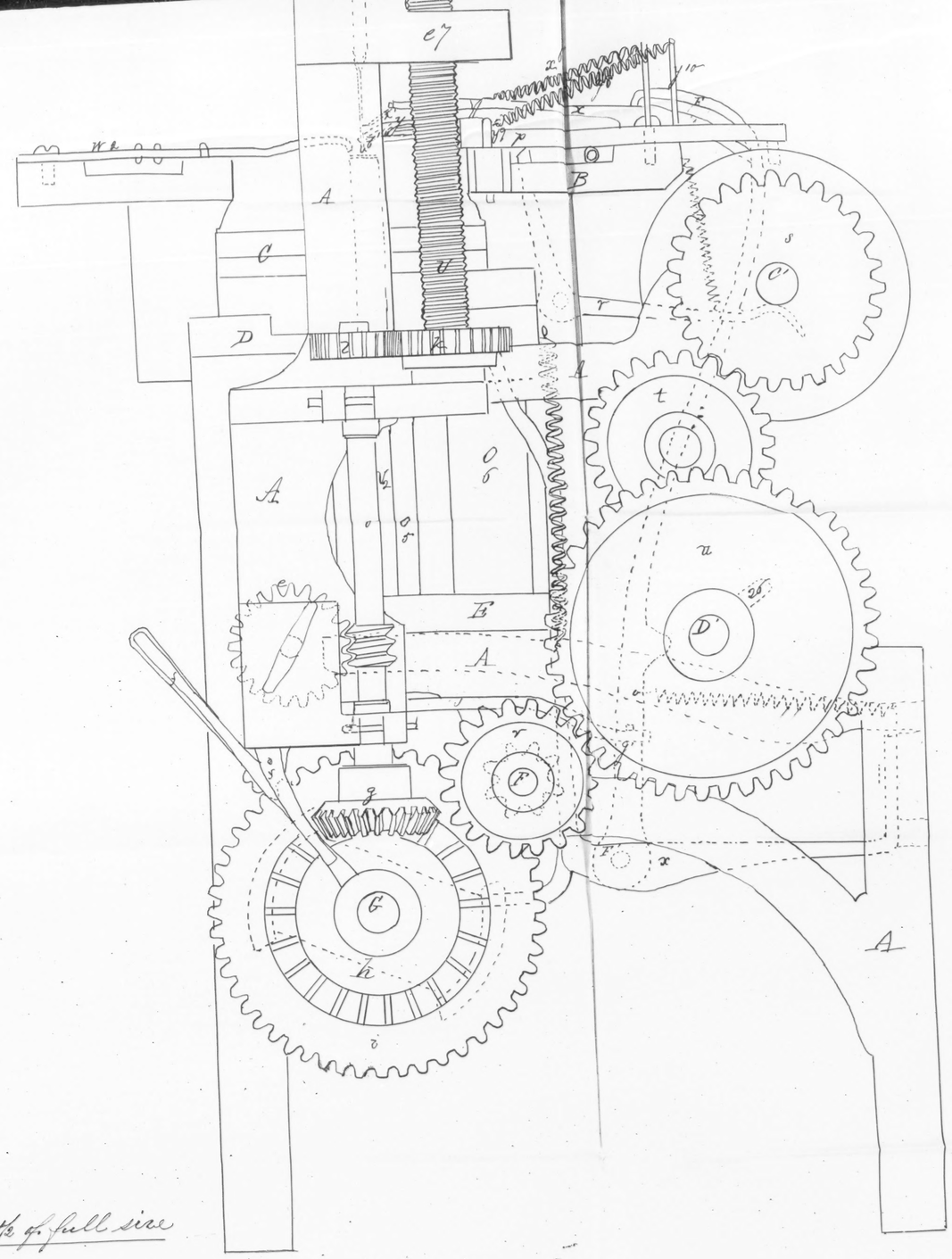

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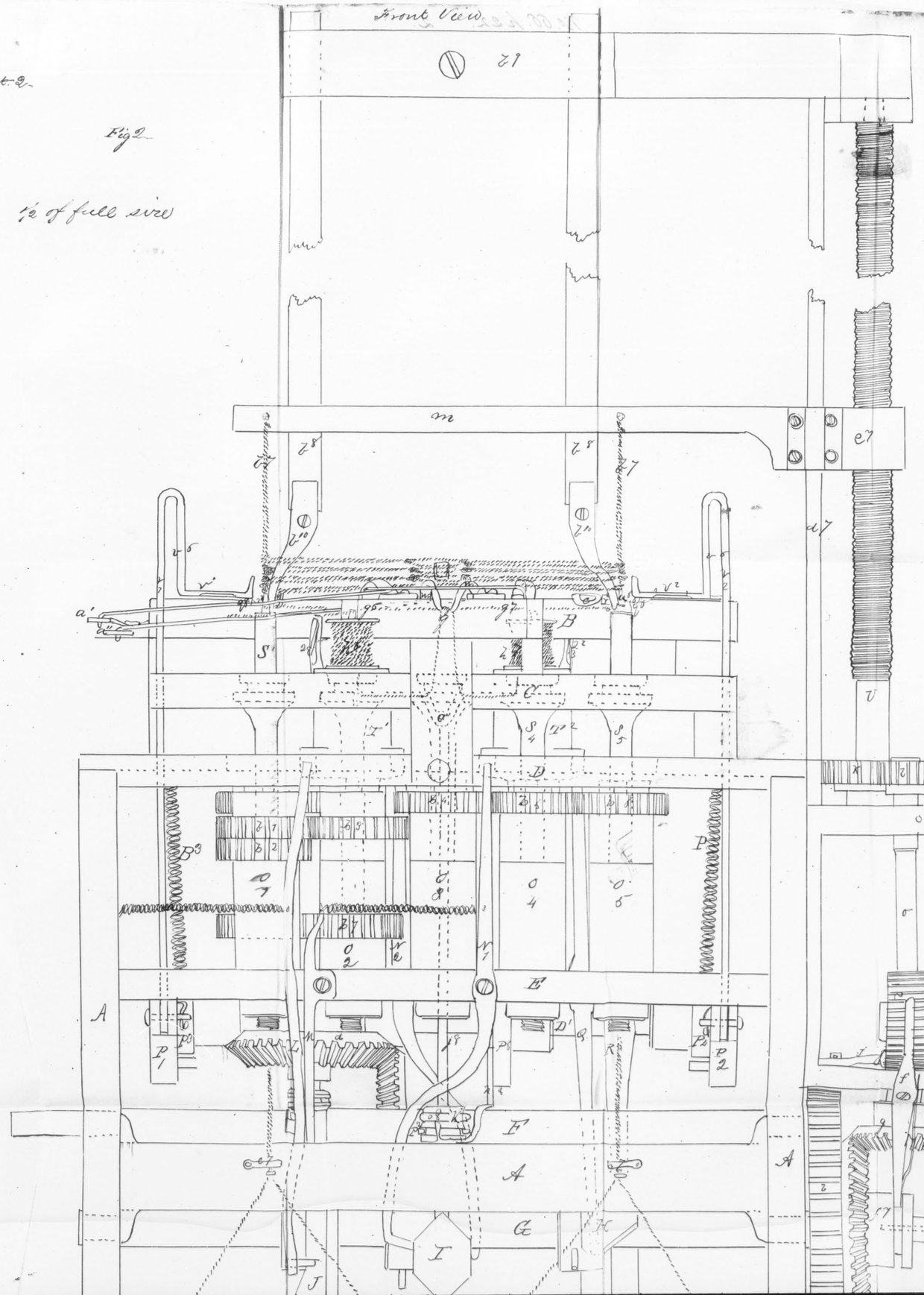

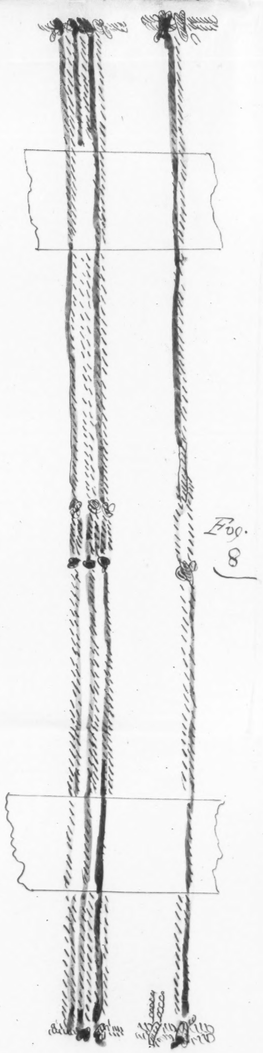

Fig. 8

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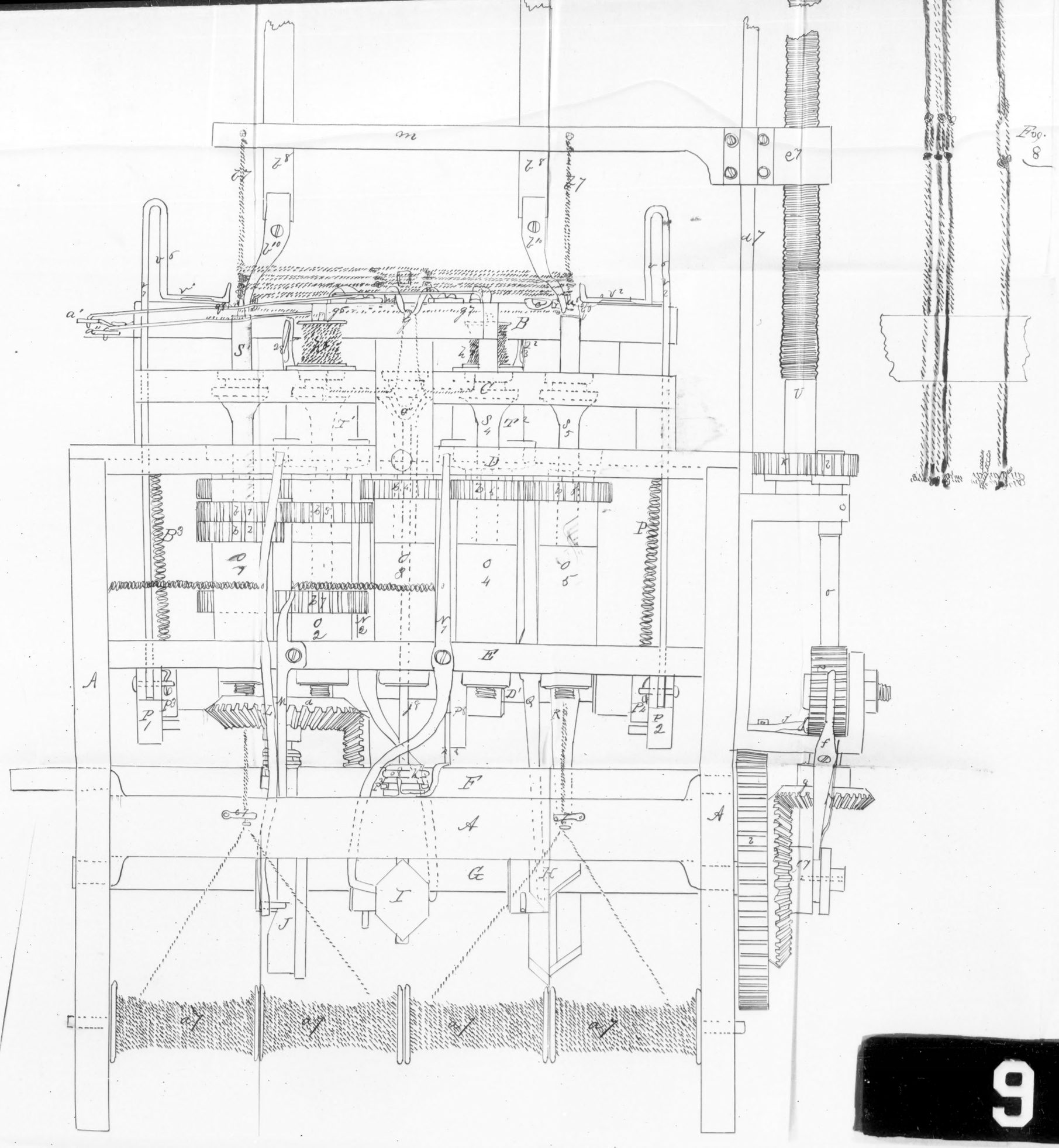

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No 169. Pa 4.

Sheet. 8.

Longitudinal Section of Plates. Studs &c.

Fig. 5 B.B.

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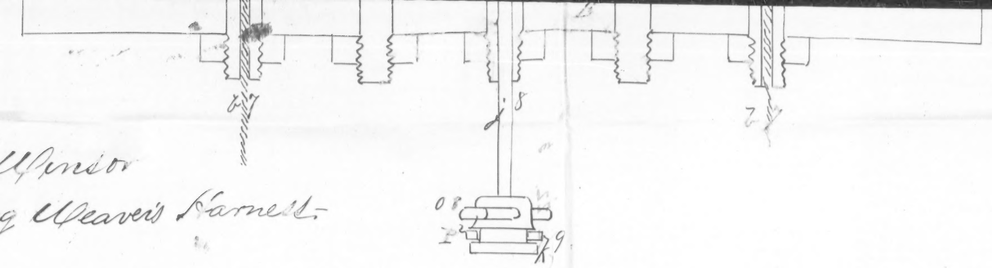
Jos. S. Upton
Making Weavers Harness.

Cross Section.

Fig 4. A.a.

Jos. S. Winsor
Making Weaver's Harness.



Cross Section

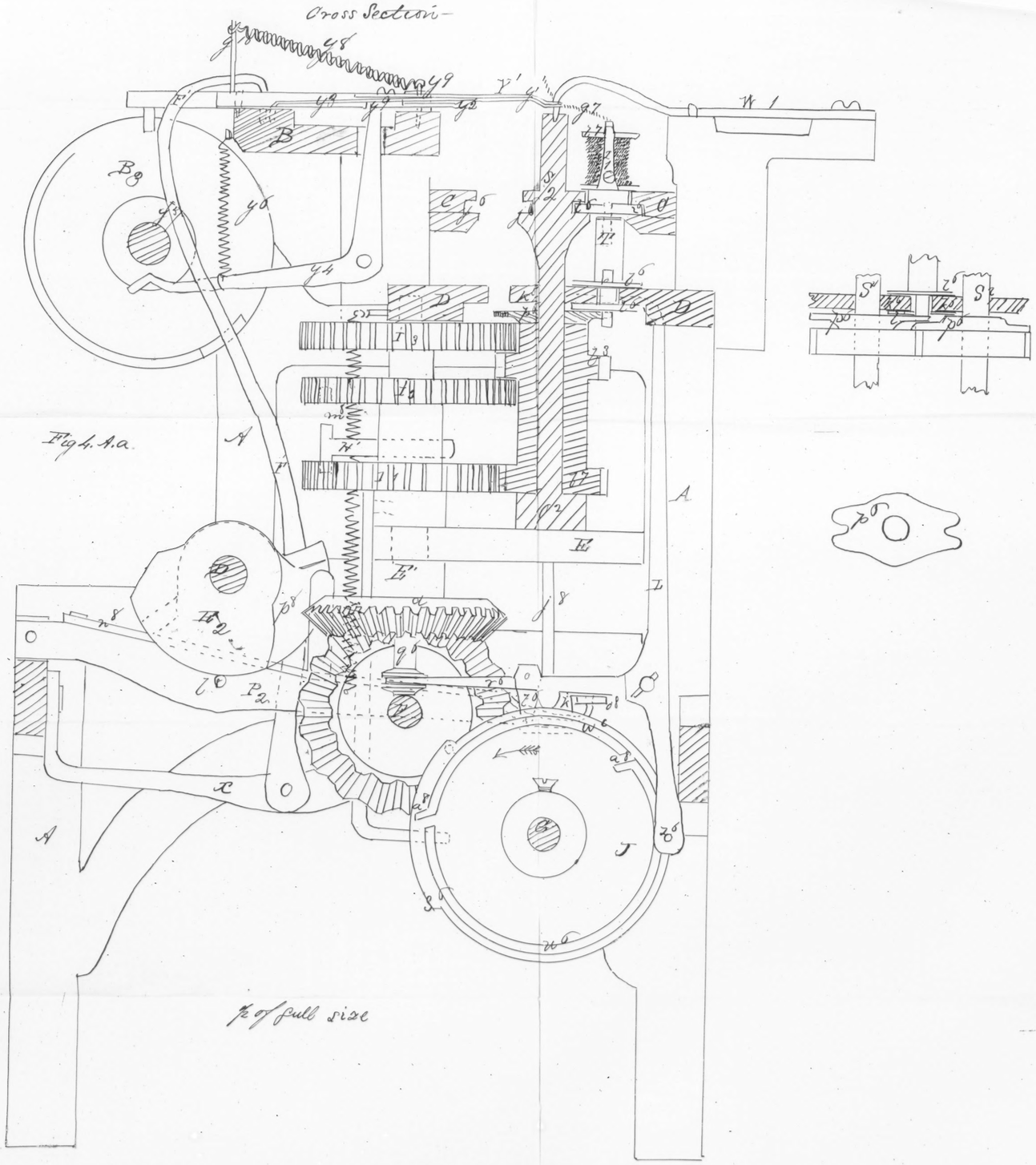


Fig 4. A.a.

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Jos. S. Winsor
Making Weaver's Harness

Section of Carrier & Spool Stand.

full size

Fig. 6

full size

Fig. 7

½ of full size

Fig. 9.

A

½ of full size

B

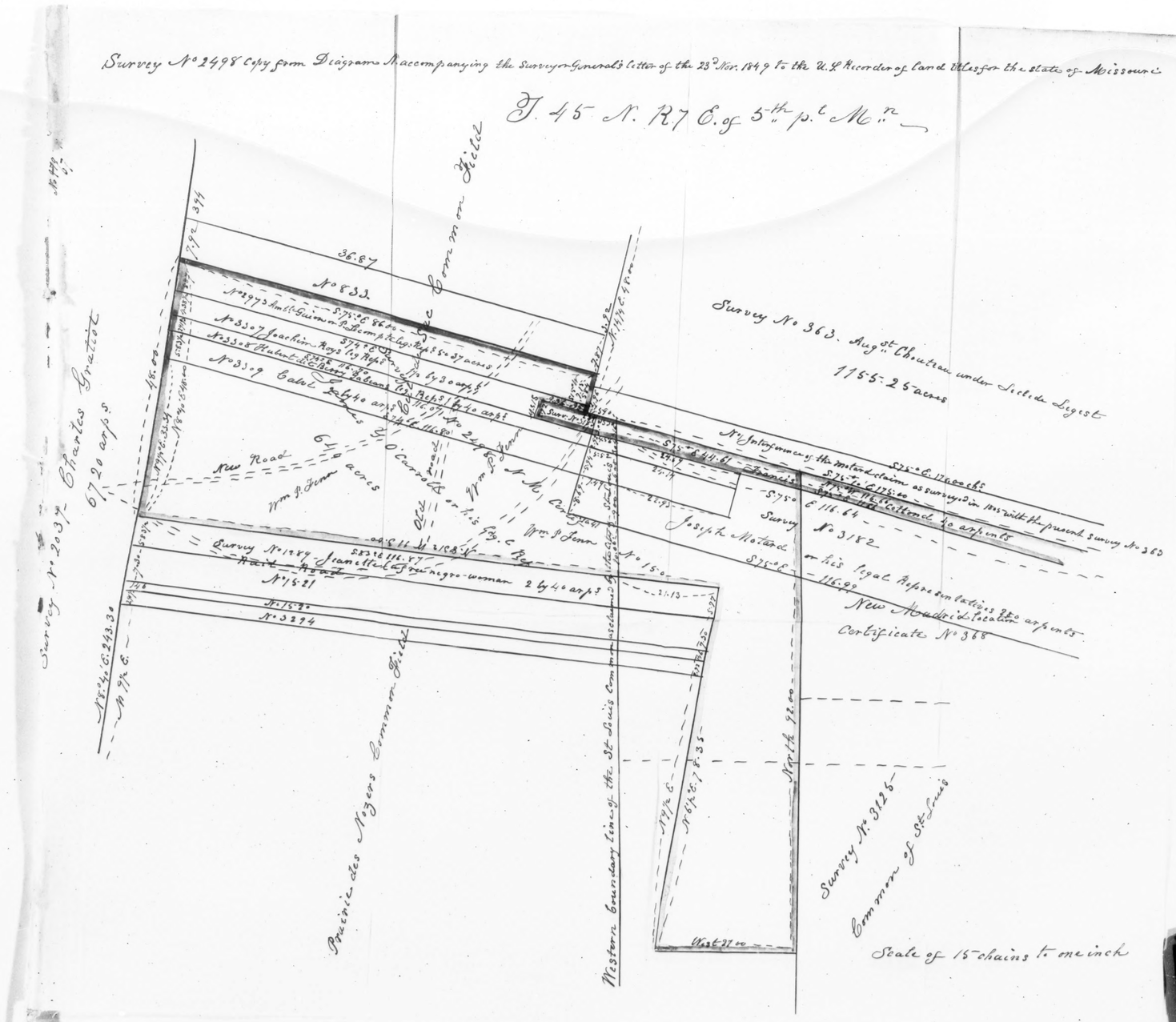
b

Fig. 8.

11

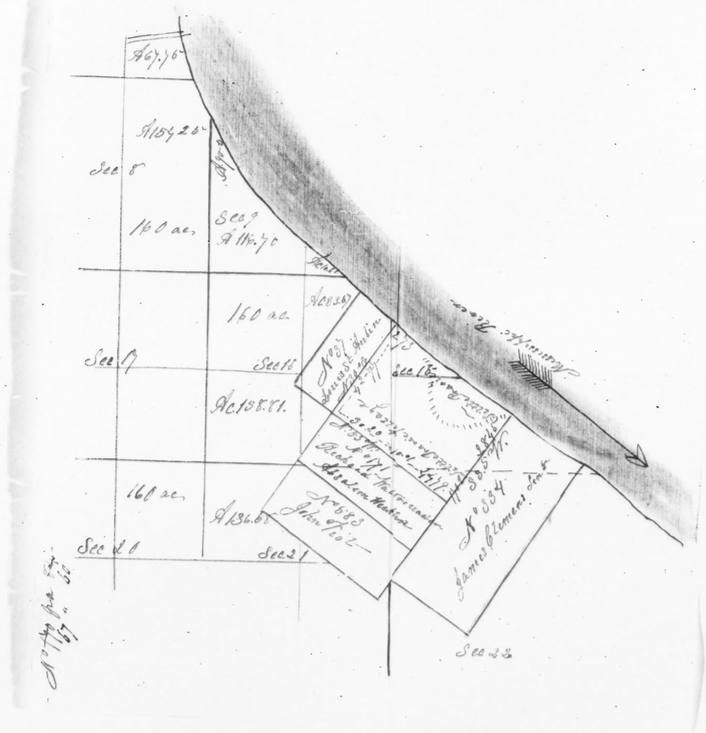
Survey No 2498 Copy from Diagram A accompanying the Surveyor-Generals Letter of the 23d Nov. 1849 to the U.S. Recorder of Land Titles for the state of Missouri

T. 45 N. R 7 E. of 5th p.l. M.n



12

Part of T 18 N Rg. 13 E. of the 5th P.M.



No 74 - pa 829 -

14

N. B. In Sections 9 & 15 R. 5 E are the Hiwassee, the Cutchata & the Congdon Copper Mines

14

No. 74 - page 64

* The North East qr. of Section 30
Re-entered by Jonas Denton
as A. O. E. at one ct. per Acre

R. 5 E. FT 4 S.

William Hancock G. E. 1 ct

William M. Hancock G. E. 1 ct 1 m

Wm Grant Sent. Entr. 12½

Wm W. Hancock Sent. Entr. G. E.

Wm W. Hancock Sent. Entr. 80 cts

William Conner Sent. E. 60 cts

Wm. Conner Sent. E. 25 cts

Euclid Waterhouse G. Entr 1 cent

William McCoy G. E. 1 ct 1 m

Euclid Waterhouse G. Entr 1 cent

Euclid Waterhouse G. Entr

Ephraim Prince Sent. Entr at $1 per acre

E. Waterhouse Sent. Entr 12½

Euclid Waterhouse G. E. 1 ct

E. Waterhouse Sent. Entr 12½

Wm. T. Green Sent. E. 12½

Williams Grant G. Entr 12½

Euclid Waterhouse G. E. 12½

Wm. T. Green Sent. E. 12½

Euclid Waterhouse G. E. 12½

Isaac N. Swan G. E. 12½

Archibald McCoy as General Entrer at 12½ cts.

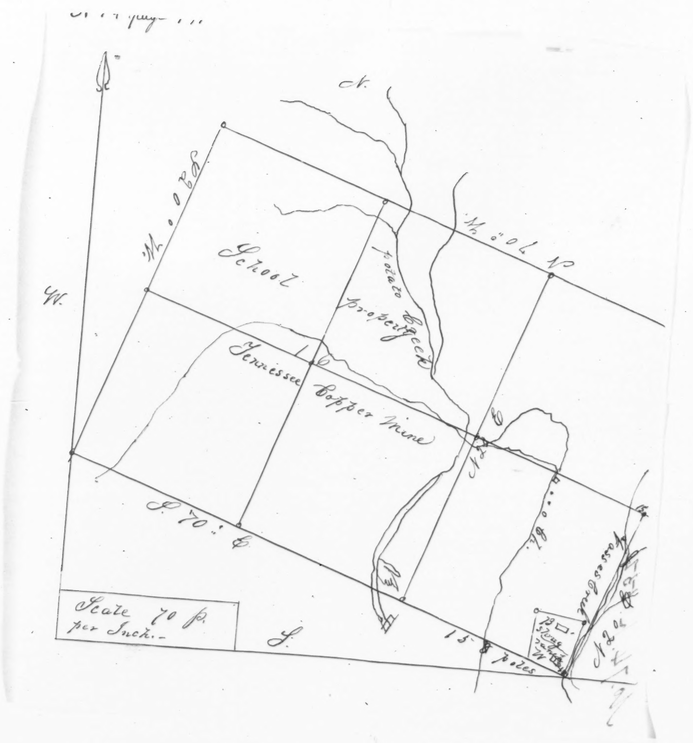
Warren Dodson G. E.

Wm. T. Green G. E. 25 cts

Euclid Waterhouse G. E. 12½

Euclid Waterhouse G. E. 12½

Euclid Waterhouse G. E. 12½


School
Tennessee Copper Mine
Scale 70 ft. per Inch.
15 ft. poles

16

17

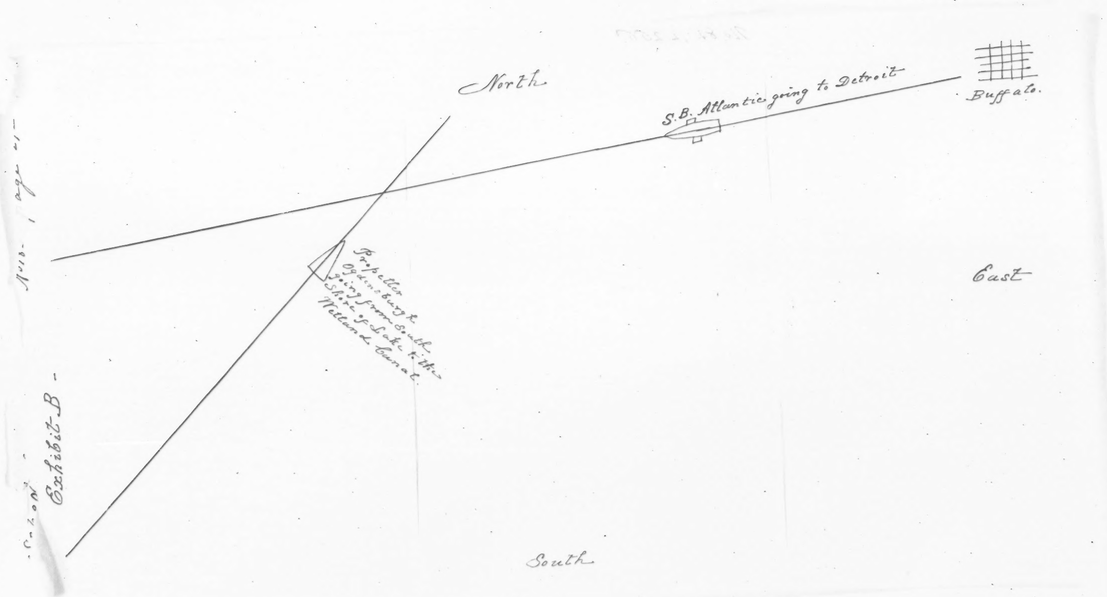
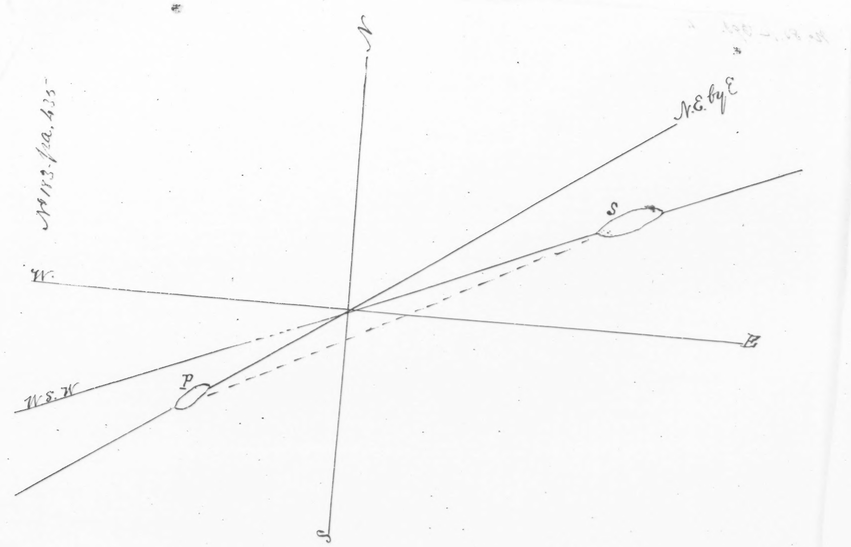
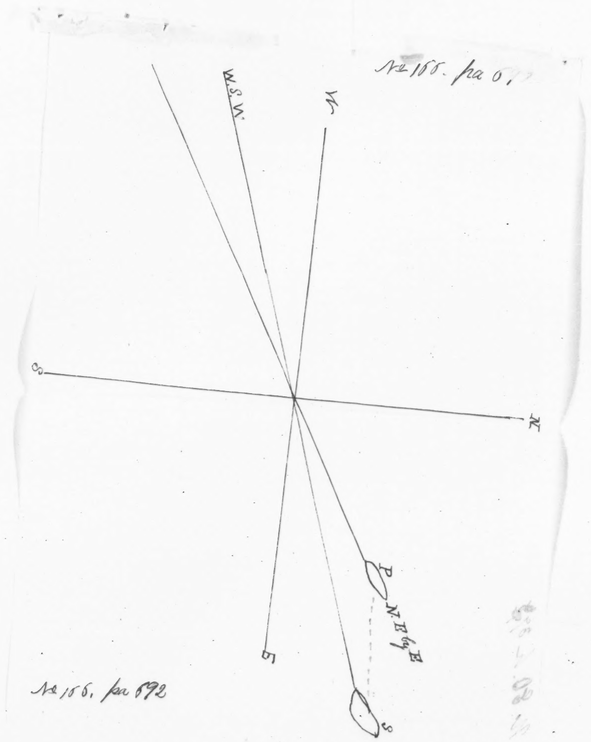


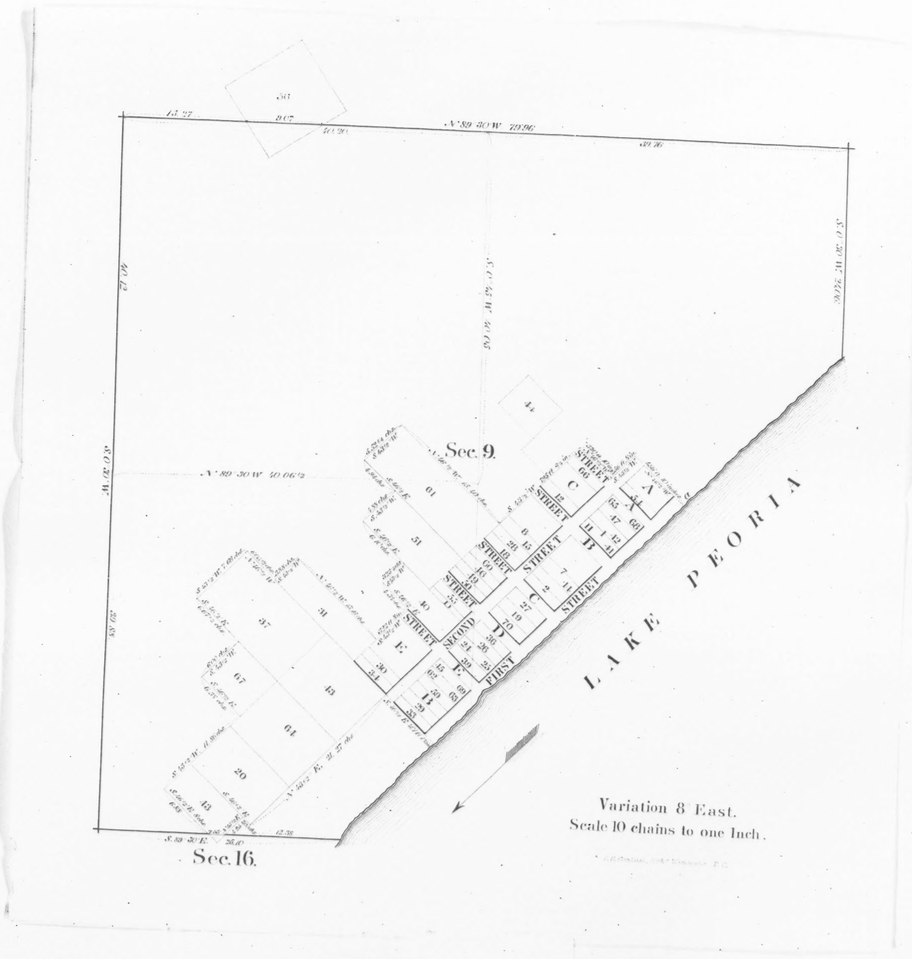
Exhibit B -

18

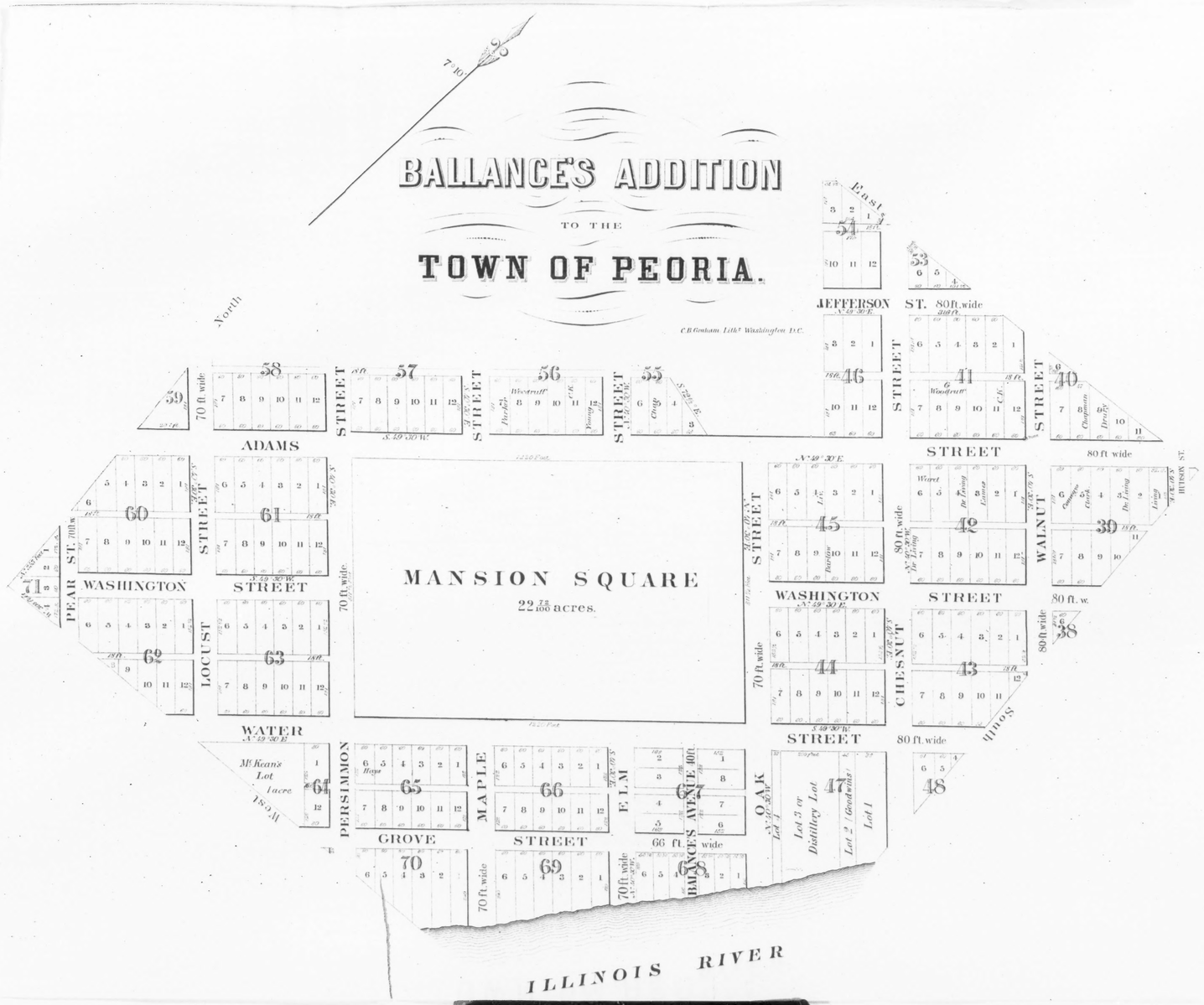

N.E. by N.
S.
W.
E.
W.S.W.
P.



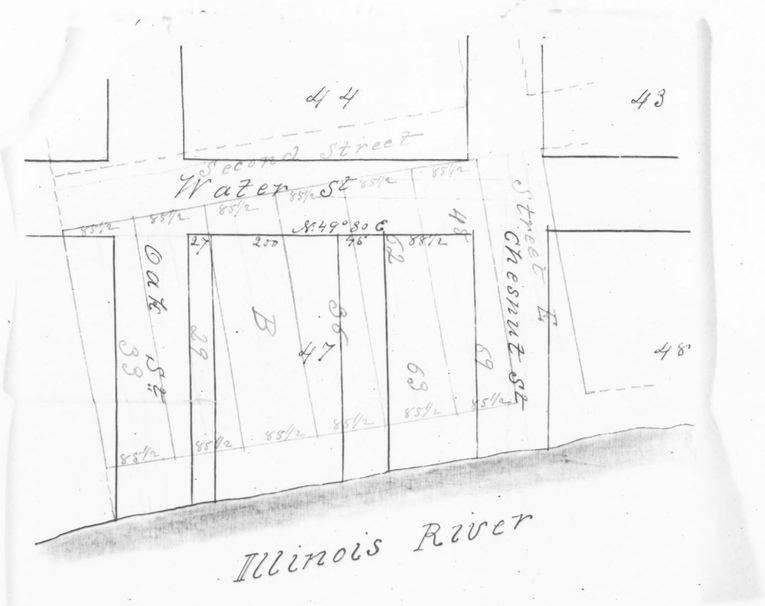
20


Sec. 9.
Sec. 16.
LAKE PEORIA
STREET
FIRST
SECOND
Variation 8 East.
Scale 10 chains to one Inch.

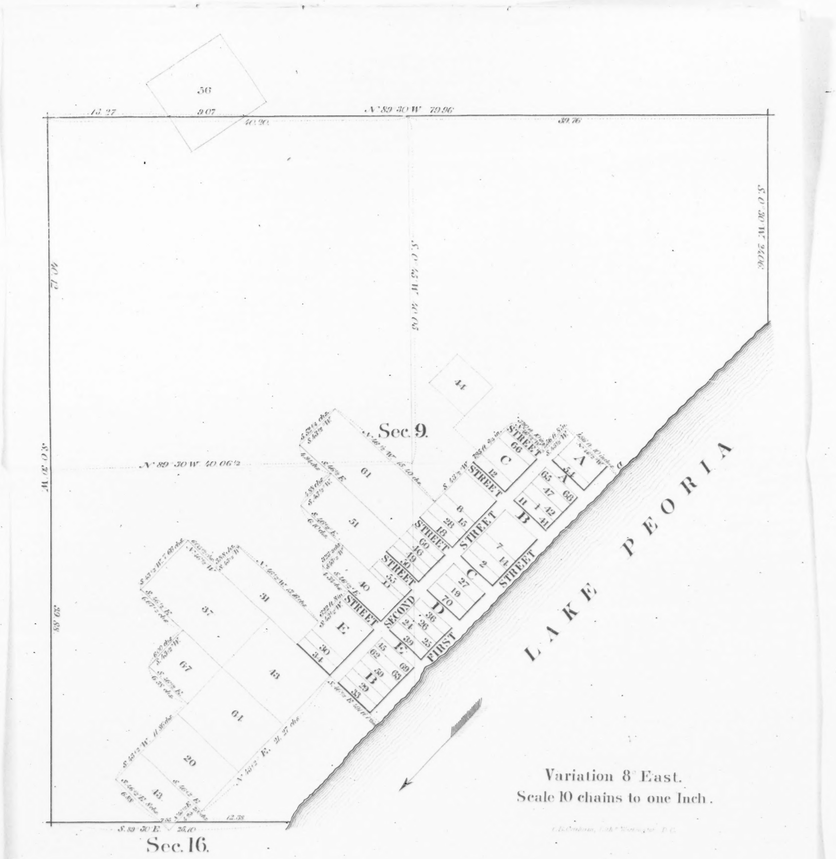
21


BALLANCE'S ADDITION
TO THE
TOWN OF PEORIA.
C.B.Graham Lith^r Washington D.C.
North
East
South
MANSION SQUARE
22 72/100 acres.
JEFFERSON ST. 80 ft. wide
ADAMS STREET
WASHINGTON STREET
WATER STREET
PEAR ST. 70 ft. w.
LOCUST STREET
PERSIMMON
GROVE STREET
MAPLE STREET
ELM
BALANCE'S AVENUE 40 ft.
OAK
CHESNUT STREET
WALNUT STREET
HUDSON ST.
70 ft. wide
80 ft. wide
66 ft. wide
McKean's Lot 1 acre
Lot 3 or Distillery Lot
Lot 2 (Goodwins)
Lot 1
ILLINOIS RIVER

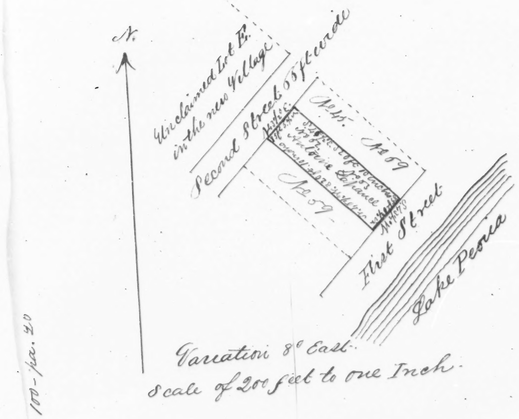
22


44
43
Second Street
Water St
N.49°30'E
Oak St
Chesnut St
Street E
B
47
48
Illinois River

29


Sec. 9.
Sec. 16.
LAKE PEORIA
STREET
SECOND
FIRST
Variation 8° East.
Scale 10 chains to one Inch.

24



No 100 - Sec. 20

25

BALLANCE'S ADDITION

TO THE

TOWN OF PEORIA.

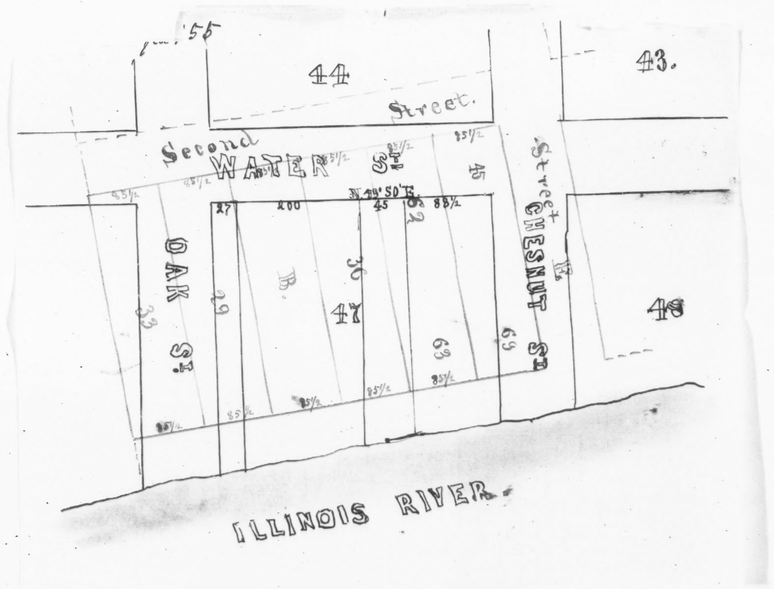
C.B.Graham, Lith^r Washington, D.C.

MANSION SQUARE

22 72/100 acres.

ILLINOIS RIVER

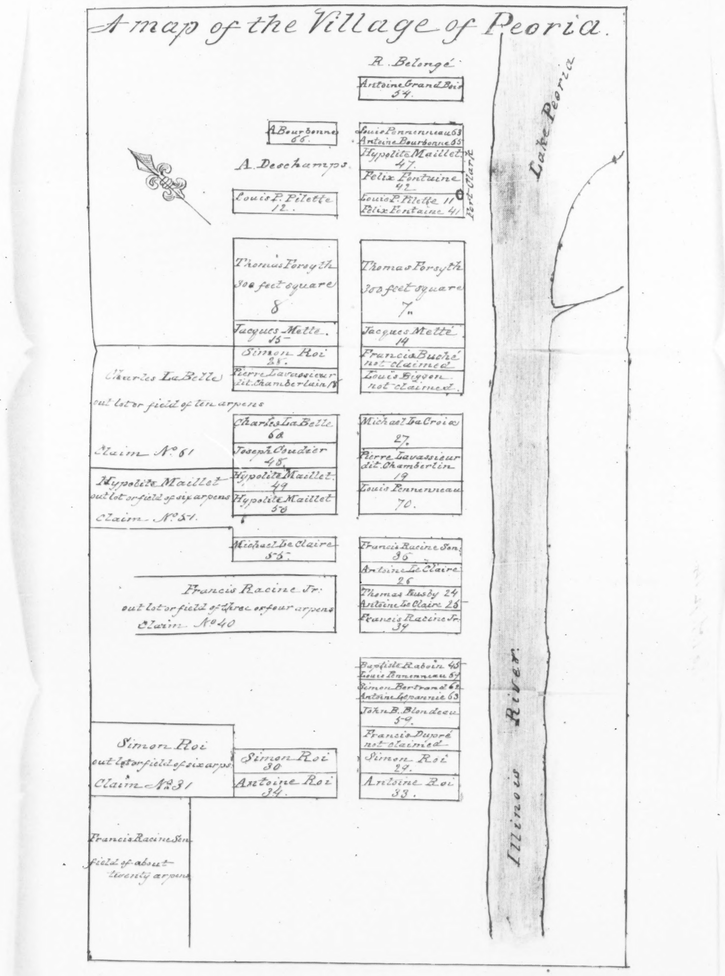
26



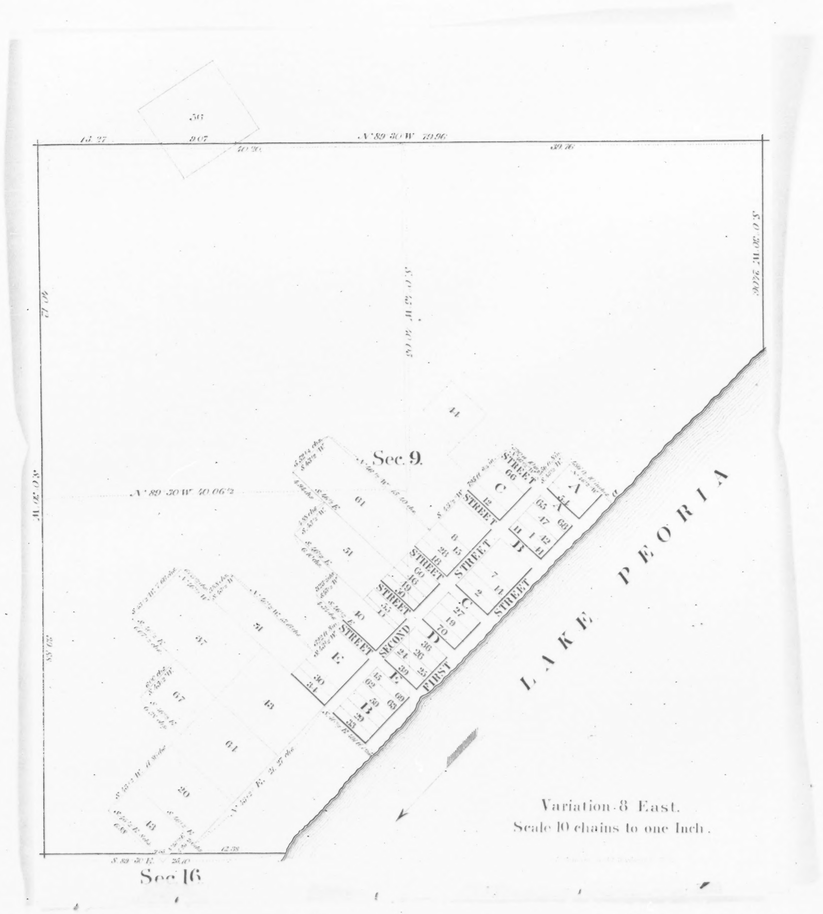
44
43.
Street.
Second
WATER ST
Street
CHESNUT ST
OAK ST
47
48
ILLINOIS RIVER.

27

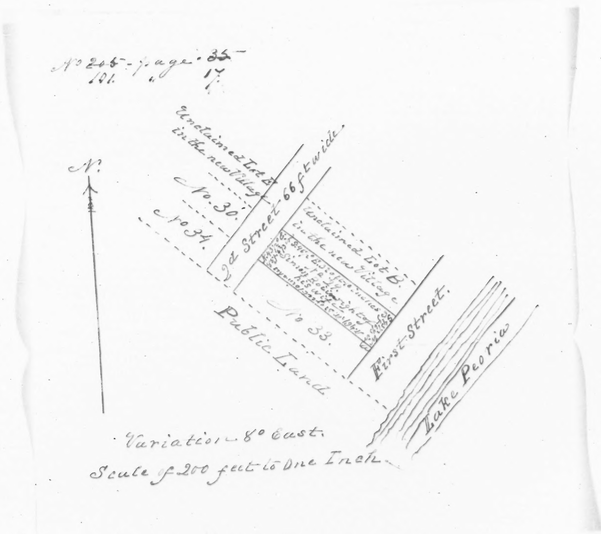
No. 205 - p. 27 -


A map of the Village of Peoria.
R. Belongé
Antoine Grand Roi 34.
A. Bourbonne 88.
Louis Panneveau 83
Antoine Bourbonne 83
A. Deschamps
Hypolite Maillet 47.
Felix Pentruine 47.
Louis B. Pilette 12.
Louis B. Pilette 11
Felix Pentaine 41
1st. Street
Lake Peoria
Thomas Forsyth 300 feet square 8
Thomas Forsyth 300 feet square 7
Jacques Mette 13
Jacques Mette 14
Simon Roi 31.
Francis Buche not claimed
Charles La Belle
Pierre Lavasseur dit Chamberlain
Louis Bigeon not claimed
out lot or field of ten arpens
Charles La Belle 68
Michael La Croix 27
Claim No 81
Joseph Quadeer 45
Pierre Lavasseur dit Chamberlin 19
Hypolite Maillet
Hypolite Maillet 49
Louis Panneneau 70.
out lot or field of one arpens
Hypolite Maillet 39
Claim No 81.
Michael La Claire 85.
Francis Racine Jun. 30
Antoine La Claire 26
Francis Racine Sr.
out lot or field of three or four arpens
Claim No 40
Thomas Busby 24
Antoine La Claire 25
Francis Racine Jr. 39
Illinois River
Baptiste Rabwin 45
Louis Panneneau 87
Simon Bertrand 64
Antoine Bourbonne 63
John B. Blondeau 54
Francis Dusore not claimed
Simon Roi
out lot or field of six arpens
Claim No 31
Simon Roi 30
Antoine Roi 34.
Simon Roi 27.
Antoine Roi 33.
Francis Racine Sen.
field of about twenty arpens

28


Sec. 9.
Sec. 16
LAKE PEORIA
STREET
SECOND
FIRST
A
B
C
D
E
F
Variation 8 East.
Scale 10 chains to one Inch.

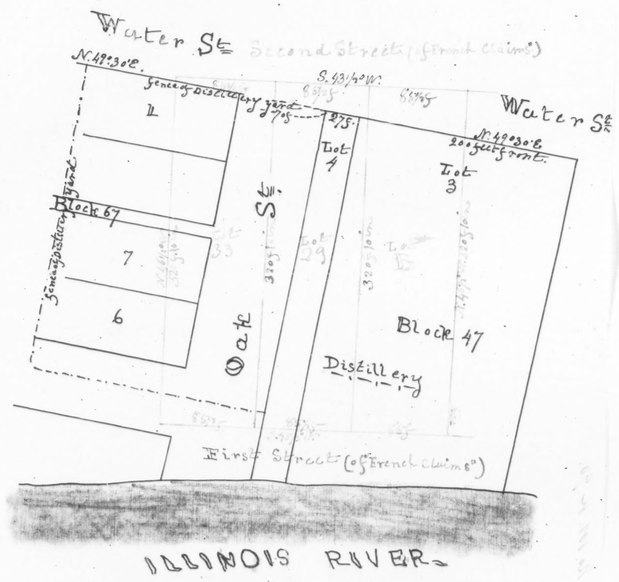
29


No 205 - page 35
191 " 17
N.
Unclaimed Lot B in the new Village
No. 30.
No 34.
2d Street 66 ft wide.
Unclaimed Lot B in the new Village
No 33.
Public Land
First Street.
Lake Peoria
Variation 8° East.
Scale of 200 feet to One Inch.

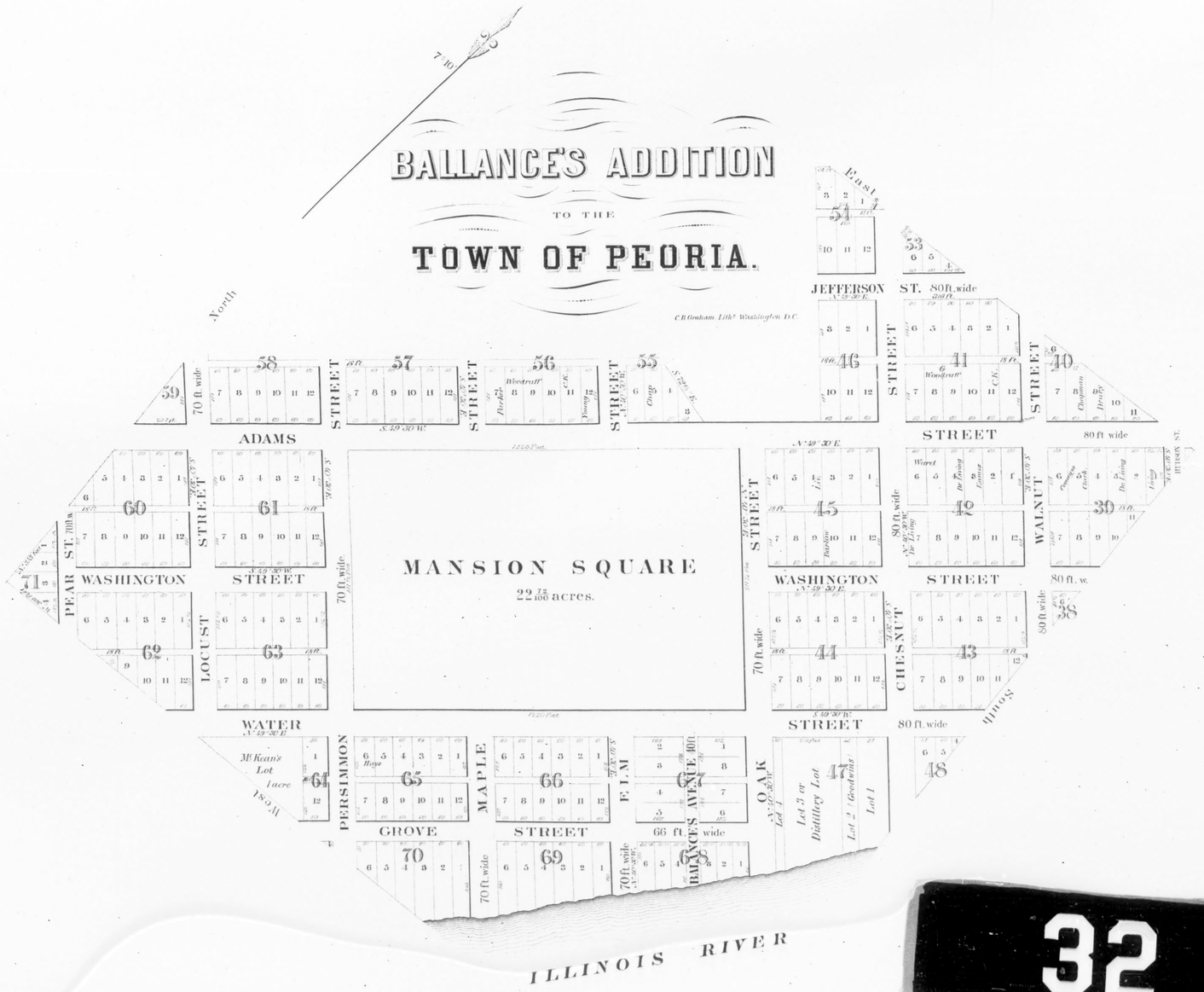
30

No. 205 – pa. 211 –

A



31


BALLANCE'S ADDITION
TO THE
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ADAMS STREET
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LOCUST STREET
PERSIMMON
MAPLE
ELM
BALANCE'S AVENUE
OAK
CHESNUT
WALNUT
MANSION SQUARE
22 72/100 acres.
70 ft. wide
80 ft. wide
66 ft. wide
McKean's Lot 1 acre
Lot 3 or Distillery Lot
Lot 2 (Goodwins)
Lot 1
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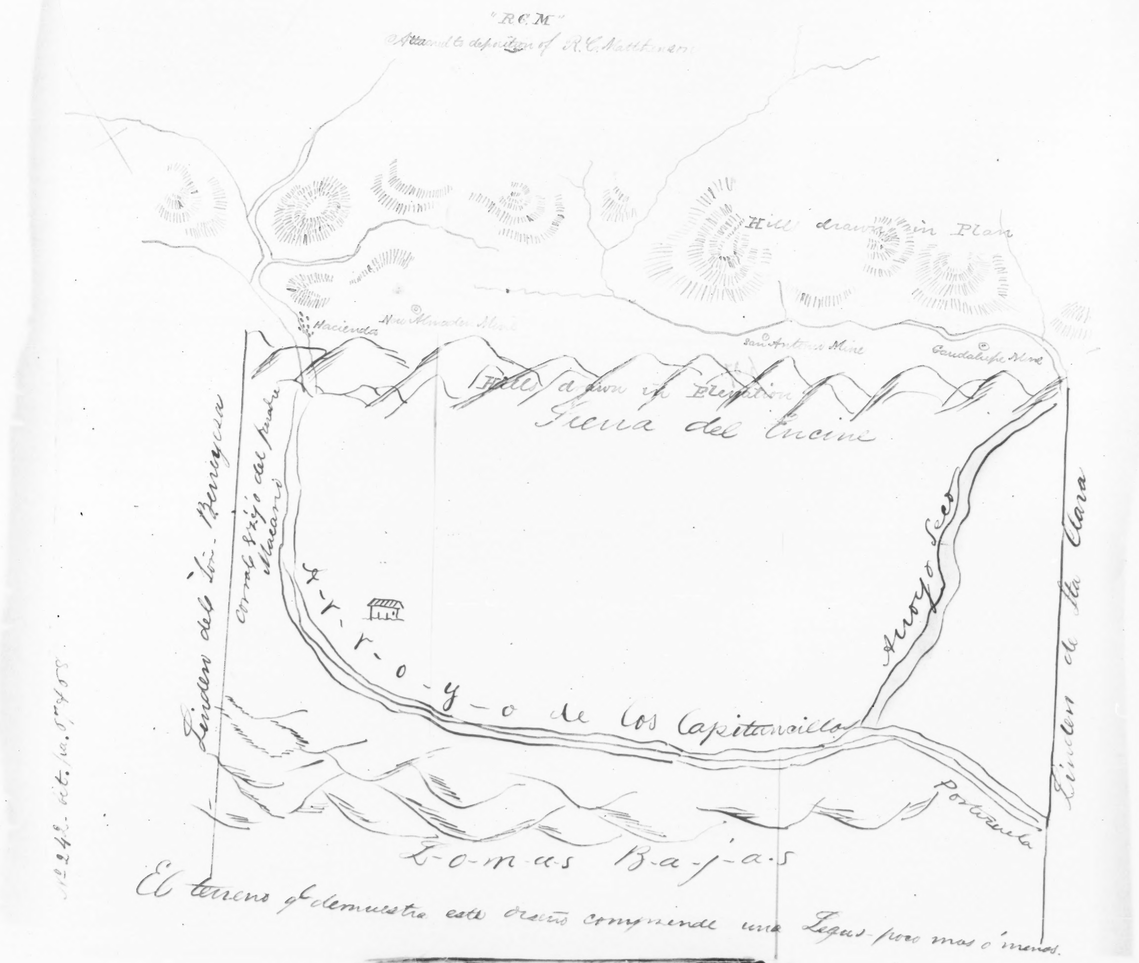
32


"R.C.M."
Attached to deposition of R.C. Matthews
Hill drawn in Plan
Hacienda
New Almaden Mine
San Antonio Mine
Guadalupe Mine
Hills drawn in Elevation
Tierra del Encino
Linderos de los Sres. Berreyesa
Corral 8 rejo del padre Macario
Arroyo Seco
Linderos de Sta Clara
Arroyo de los Capitancillos
Portezuela
Lomas Bajas
El terreno q. demuestra este diseño comprende una Legua poco mas ó menos.

33